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No. 92-1854

In The

Supreme Court of the United States

October Term, 1992

KATHLEEN POOLE, as Administratrix of the Estate of DAVID POOLE,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

Petition for Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was plaintiff's decedent, David Poole, denied due process of law under the Fourteenth Amendment to the United States Constitution when former Chief Judge Sol Wachtler of the New York State Court of Appeals participated in and actually wrote the opinion in the appeal of plaintiff's decedent, where the appeal concerned a question of first impression regarding the proper use of and comment upon surreptiously-taken surveillance photographs and films, where former Chief Judge Wachtler had an interest in such a question of law due to the fact that in numerous letters and phone calls to a former mistress, he stated he had taken, "as part of an extortion scheme", photographs and films of his former mistress and her current lover, and where the precedent established in the *Poole* case would be used by Wachtler in defending against civil as well as criminal proceedings brought against him?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 2

Statement of Jurisdiction 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

I. The highest court of New York State rendered a "final judgment or decree" upon a federal question. 9

II. The participation by former Chief Judge Wachtler in the decision, and the failure of the Court of Appeals to grant reargument, denied petitioner's-decedent due process under the Fourteenth Amendment. 10

Conclusion 20

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580 (1986) 3, 7, 8, 11, 12, 13, 14, 16, 18, 19

Cox Broadcasting Corporation v. Cohen, 420 U.S. 469, 93 S. Ct. 1029 (1975) 9, 10

Gilly v. City of New York, 69 N.Y. 2d 509, 516 N.Y.S. 2d 166 (1987) 19

Gravitt v. Newman, 114 A.D. 2d 100, 495 N.Y.S. 2d 439 (2nd Dept. 1985) 17

Green v. Fischbein Oliveri Rozenholc & Badillo, 119 A.D. 2d 345, 507 N.Y.S. 2d 148 (1st Dept. 1986) 17

In Re Murchison, 349 U.S. 136, 75 S. Ct. 625 ..... 8, 13

New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984) 10

Noce v. Kaufman, 2 N.Y. 2d 347, 161 N.Y.S. 2d 1 (1952) 19

Oakley v. Aspinall, 3 N.Y. 547 (1850) 13

Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989 (1987) 10

Contents

	Page
Reehil v. Fraas, 197 N.Y. 64 (1909)	19
United Commodities-Greece v. Fidelity International Bank, 64 N.Y. 2d 449, 498 N.Y.S. 2d 449, 478 N.E. 2d 172 (1985), reargument denied, 65 N.Y. 2d 923, 493 N.Y.S. 2d 1030, 483 N.E. 2d 136 (1985)	9
Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80 (1972)	12
Statutes Cited:	
28 U.S.C. § 1257	3
45 U.S.C. § 51	3, 4
United States Constitution Cited:	
Fourteenth Amendment	i, 3, 6, 7, 8, 9, 10, 11, 12, 20
Rules Cited:	
Supreme Court Rule 13.1	3
Supreme Court Rule 13.4	3
APPENDIX	
Appendix A — Order of the New York Court of Appeals Granting Extension of Time Denying Reargument Dated February 18, 1993	1a

Contents

	Page
Appendix B — Opinion and Order of the New York Court of Appeals Dated October 20, 1992	3a
Appendix C — Opinion of the New York Supreme Court Appellate Division Fourth Department	21a
Appendix D — Judgment of the New York Supreme Court, County of Erie Dated November 2, 1990	25a
Appendix E — Order of the New York Supreme Court, County of Erie Dated December 15, 1992	27a
Appendix F — Excerpts of Affidavit of Paul W. Beltz in Support of Motion for Reargument in the Court of Appeals	29a
Appendix G — Complaint, Indictment, Plea Bargain and Excerpts of Transcript of Proceedings in *United States of America v. Sol Wachtler*	40a

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathleen Poole, as Administratrix of the Estate of David Poole, respectfully prays that a writ of certiorari issue to review the order of the New York State Court of Appeals, entered February 18, 1993, which denied reargument of an order of the New York State Court of Appeals entered October 20, 1992, and to review the order and opinion of the New York State Court of Appeals entered October 20, 1992.

OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 80 N.Y. 2d 184, 590 N.Y.S. 2d 1, 604 N.E. 2d 63 (1992) and is reprinted in the Appendix to this petition at 3a.* The opinion of the Appellate Division, Fourth Department of New York State Supreme Court is reported at 178 A.D. 2d 941, 579 N.Y.S. 2d 941 (4th Dept. 1991) and is reprinted in this Appendix at 21a.

STATEMENT OF JURISDICTION

The opinion and order of the Appellate Division, Fourth Department, which, on a three to two vote, affirmed the judgment in plaintiff's favor, was entered on December 26, 1991. Defendant Consolidated Rail Corporation appealed to the New York State Court of Appeals on January 24, 1992.

The opinion and order of the New York State Court of Appeals, which reversed the order of the Appellate Division, and ordered a new trial, was entered on October 20, 1992 (19a-20a). Chief Judge Wachtler of the Court of Appeals was arrested on November 7, 1993 on a federal extortion charge, based upon threats he made to his former paramour to publicize compromising surveillance photographs of her with her current lover.

On December 15, 1992, Kathleen Poole was substituted as party plaintiff (27a-28a) following the death of her forty-year-old husband, David Poole, the named plaintiff in this action, on October 28, 1992—a mere eight days after the decision and order of the Court of Appeals were entered. In addition to his wife, David Poole is survived by his three daughters, ages seven, eleven and thirteen.

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* References to the Appendix are represented by __ a.

Although the New York State Court of Appeals granted the motion for an extension of time to reargue, the Court denied the motion to reargue on the merits, without opinion, in an order entered February 18, 1993 (1a-2a).

In her reargument motion, petitioner alleged that the deceased plaintiff had been deprived of due process of law under the Fourteenth Amendment of the United States Constitution (see pp. 21-29 of affidavit in support of motion for reargument [29a-39a]), due to the improper participation of former Chief Judge Wachtler in a case in which he was personally interested in a point of law to be decided by the Court of which he was a member. Former Chief Judge Wachtler wrote the opinion for the New York State Court of Appeals.

Based upon the foregoing, the jurisdiction of this Court is invoked, pursuant to 28 U.S.C. § 1257. Both the October 20, 1992 and February 18, 1993 orders are reviewable, pursuant to Supreme Court Rules 13.1 and 13.4.

STATUTORY PROVISIONS INVOLVED

Action was brought pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51. However this petition, and the prior motions to reargue in the New York State Court of Appeals, involve the interpretation of the Fourteenth Amendment of the United States Constitution, as construed in the case of *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 106 S. Ct. 1580 (1986). Petitioner avers that the orders of the New York State Court of Appeals deprived her and her decedent, David Poole, formerly the plaintiff in this case prior to his death on October 28, 1992, of due process under the law pursuant to the Fourteenth Amendment.

STATEMENT OF THE CASE

On August 22, 1983, David Poole, a carman employed by defendant Consolidated Rail Corporation (hereinafter *Conrail*), was injured while participating in a gondola repair project during the course of his employment with Conrail. A rung of a ladder he was using broke, causing him to first strike his groin forcefully on a lower rung, and then to fall backwards into the gondola car, sustaining disc herniation, radiculopathy and impotence.

Petitioner's decedent commenced an action against Conrail in the New York Supreme Court, Erie County, under the Federal Employees Safety Act ("FELA"), 45 U.S.C. § 51, alleging negligence in the maintenance of the ladder he was using, failure to provide a safe ladder, and improper positioning of the ladder amid unstable debris in the bottom of the gondola car.

During the course of discovery in the case, David Poole was granted disclosure of a surveillance videotape taken of him surreptitiously by agents of his employer. Because the videotape evidenced the severity of injury David Poole was claiming, Conrail did not choose to exhibit it to the jury.

At conclusion of the trial of David Poole's action against Conrail, the jury rendered a verdict in David Poole's favor, finding Conrail's negligence to be the sole cause of plaintiff's injuries, and awarding plaintiff damages in the amount of $4,152,000.

Conrail appealed to the New York State Supreme Court, Appellate Division, Fourth Department, alleging, among other grounds, that a new trial should be granted because discovery of the surveillance tape should not have been granted and that reversible error occurred when David Poole's counsel, in summation, asked the jury to infer that the surveillance tapes must have been favorable to David Poole because Conrail failed to

exhibit them to the jury. By a three to two vote, the Appellate Division affirmed the judgment entered upon the jury's verdict (21a-24a). The two dissenting justices were of the opinion that reversible error was committed by David Poole's trial counsel when he asked the jury, in summation, to draw the same negative inference from Conrail's failure to exhibit the surveillance videotape taken by Conrail that could, under long-established legal principles, be drawn from Conrail's failure to call the three medical specialists who examined David Poole on behalf of the defense to the witness stand on its behalf.

Conrail then appealed to the New York State Court of Appeals, the state court of last resort, on January 29, 1992. The Court of Appeals, in an opinion written by Chief Judge Sol Wachtler, reversed the Appellate Division order appealed from and ordered a new trial. Chief Judge Wachtler wrote that reversible error had been committed by David Poole's counsel's reference during summation to non-production of the surveillance films (15a). The opinion and order of the Court of Appeals were entered on October 20, 1992.

On November 7, 1992, merely eighteen days following the entry of the Court's order, former Chief Judge Wachtler was arrested and arraigned on federal extortion charges. The criminal complaint charged the then Chief Judge with having made a demand for $20,000 to his former paramour in exchange for the delivery of compromising photographs taken of her with her current lover (48a, 51a-52a). The indictment, later acknowledged by former Chief Judge Wachtler to be accurate (69a-71a), described the numerous letters and telephone calls that had been sent and made by him as part of his extortion scheme throughout the pendency of the *Poole* appeal before his Court (47a-54a). In fact, an extortion letter was actually delivered by or on behalf of Wachtler on September 12, 1992, the day after oral argument of the *Poole* appeal (50a), which described how Wachtler might be

contacted concerning his demand for money in exchange for the surveillance materials.

Petitioner moved for reargument of her appeal to the Court of Appeals on the grounds that her decedent's right to due process under the Fourteenth Amendment of the United States Constitution was violated by the participation of Former Chief Judge Wachtler in the deciding of the appeal. Because the appeal involved questions concerning whether a party may use surveillance materials taken by the opposing party during a trial, and if so, the extent such use is allowable, former Chief Judge Wachtler should not have participated in the decision of the appeal. He had too great a personal interest in any rulings covering the use of surveillance materials for him to have been a judge in this case, due to his own use of surveillance in his private life and due to the probability that any rulings made by the Court of Appeals on the subject would be used by Wachtler in future civil, as well as criminal actions, arising out of his surveillance activities.

On February 1, 1993 the former Chief Judge, who resigned after his arrest, was indicted upon six counts of extortion and related crimes (42a). He was arraigned on February 17, 1993, pleading not guilty and serving notice that an insanity defense would be used (42a).

The Court of Appeals denied the reargument motion on February 18, 1993 (1a-2a).

Subsequently, as a result of a plea bargain agreement, former Chief Judge Wachtler pleaded guilty to one count of making an interstate kidnapping threat (43a, 55a-63a). Wachtler succeeded in his pursuit of a plea bargaining arrangement which would allow him to plead guilty to a charge other than that of extortion. After pleading guilty, Wachtler made a statement in open court, admitting that he had committed extortion by making threats by

phone and by letter and, in essence, admitting the truth of all the allegations made against him in the indictment (68a-72a). Wachtler also stated that he had been informed by several psychiatrists that he suffered from a manic depressive disorder throughout his campaign against his former paramour (71a), which encompassed the entire period that the *Poole* case was before the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the instant case raises important issues concerning whether the integrity of the judicial system has been compromised due to the appearance, to the public at large, that injustice has been done, because the Chief Judge of New York State's highest court, wrote the court's opinion therein. This case has called into question the presumed impartiality of the judiciary. There should be a full judicial review of whether the personal benefit that Chief Judge Wachtler stood to gain, in subsequent civil and criminal proceedings, from the New York Court of Appeals' opinion that he authored in the instant case, should have disqualified him from participation in the *Poole* appeal in order to preserve the public's respect for the integrity of the judiciary.

When the Supreme Court decided to consider the case of *Aetna Life In. Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d, it determined, judging from the subsequent opinion rendered, that the question of whether a judge's interest or bias rose to the level of a violation of the Due Process Clause of the Fourteenth Amendment was a matter of grave concern to not only the parties involved in the particular case, but also to the public's perception of the judicial system:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who

> would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'Justice must satisfy the appearance of justice.' " *Murchison*, 39 U.S. at 136, 75 S. Ct. at 625 (citation omitted).

Aetna Life Ins. Co., supra, 475 U.S. at 825, 106 S. Ct. at 1587.

The arrest of Chief Judge Wachtler upon charges of extortion, based on threats to publicize surreptitiously-taken photographs and videotapes if $20,000 were not paid, received a great deal of media attention in New York State, if not throughout the whole country. In light of Chief Judge Wachtler's activities, as reported in the media, a question would arise in the public mind concerning how he could render an unbiased opinion on the subject of whether, and under what circumstances, surveillance materials may be shown to or even commented upon before a jury.

Under these circumstances, in order to preserve both the petitioner's right to due process under the Fourteenth Amendment, and the public's confidence in the integrity of the judiciary, there should have been a full consideration of the questions presented on reargument to the New York State Court of Appeals concerning whether there was such an appearance of impropriety that the appeal in this case should be reheard by the court, without the participation of former Chief Judge Wachtler. Instead, the motion for reargument was summarily rejected, without any opinion or memorandum by the Court of Appeals explaining its reasoning.

Because the New York State Court of Appeals failed to grant reargument and reconsider its prior rulings without the presence of former Chief Judge Wachtler, the Supreme Court of the United States should grant certiorari, not only so as to redress the petitioner's deprivation of her Fourteenth Amendment due process

rights, but also to preserve the integrity of the judiciary in the eyes of the public at large.

I.

THE HIGHEST COURT OF NEW YORK STATE RENDERED A "FINAL JUDGMENT OR DECREE" UPON A FEDERAL QUESTION.

Petitioner, in her motion for reargument, contended that reargument should be granted because the deceased plaintiff's rights to due process under the Fourteenth Amendment of the United States Constitution were violated as a result of the improper participation of the New York State Court of Appeals' Chief Judge Wachtler in the decision of the appeal to that Court.

Although the order of the Court of Appeals sought to be reviewed by this Court did not finally determine the action, the February 18, 1993 order did finally determine the plaintiff's federal question: deprivation of due process under the law pursuant to the Fourteenth Amendment. Even if this case were, after retrial, to come before the Court of Appeals again, the question of deprivation of due process rights due to the participation of former Chief Judge Wachtler could not be reviewed again, because the Court of Appeals has already ruled upon the subject. *See United Commodities-Greece v. Fidelity International Bank,* 64 N.Y. 2d 449, 498 N.Y.S. 2d 449, 478 N.E. 2d 172 (1985), *reargument denied* , 65 N.Y. 2d 923, 493 N.Y.S. 2d 1030, 483 N.E. 2d 136 (1985).

This Court identified four categories of cases in which certiorari could be granted based upon a "final judgment or decree" upon a federal question by a state's highest court, despite the pendency of further proceedings in the case, in *Cox Broadcasting Corporation v. Cohen,* 420 U.S. 469, 93 S. Ct. 1029 (1975). The

case at bar falls within the third category, ". . . those situations where the federal claim has been finally decided, with further proceedings upon the merits in state courts, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Cox Broadcasting, supra,* 42 U.S. at 482, 95 S. Ct. at 1039. Whatever the ultimate result is in any further proceedings in the instant case, the federal question previously raised will not be reconsidered.

In analogous circumstances, this Court found it had jurisdiction under category three identified by the *Cox Broadcasting* court. *See, e.g., Pennsylvania v. Ritchie,* 480 U.S. 39, 107 S. Ct. 989 (1987); *New York v. Quarles,* 467 U.S. 649, 104 S. Ct. 2626 (1984).

Based upon the foregoing, this Court has jurisdiction because there has been a "final judgment or decree" upon a federal question by the highest court of a state.

II.

THE PARTICIPATION BY FORMER CHIEF JUDGE WACHTLER IN THE DECISION, AND THE FAILURE OF THE COURT OF APPEALS TO GRANT REARGUMENT, DENIED PETITIONER'S-DECEDENT DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Reargument of petitioner's appeal should have been granted due to the revelations, which came to light due to the arrest, indictment, and guilty plea of Chief Judge Wachtler after the decision of the Court of Appeals, upon a charge of extortion premised upon the making of a demand for $20,000 to his ex-paramour in exchange for the delivery of embarrassing surveillance materials to her. The criminal complaint and indictment charged the former Chief Judge with making threats

concerning surveillance materials by phone and by letters throughout the pendency of the appeal in the instant case before his Court, and with even delivering an extortion letter on September 12, 1992, the day after the oral argument of this case before the Court of Appeals (50a). After entering his guilty plea to making an interstate kidnapping threat against Mrs. Silverman's daughter, Wachtler admitted the truth of the charges made against him in the indictment (68a-72a).

Former Chief Judge Wachtler should have recused himself from this appeal, and his failure to do so violated plaintiff's right to due process under the Fourteenth Amendment to the United States Constitution, as well as created an appearance of impropriety under these unusual circumstances. He surely must have realized that in the event of the institution of felony extortion charges against him, such as those which shortly followed the rendering of the decision by the Court of Appeals, the decision reached by the Court of Appeals would be of use to him personally. The precedent established concerning an opposing party's inability to use or even comment upon surveillance materials during trial, if the party creating them does not use them, would be subject to use in a defense against criminal prosecution, either concerning his guilt or as part of a claim that non-use of such materials should be considered as a mitigating factor. These arguments may well have been used to obtain a plea bargain allowing him to plead guilty to a charge other than extortion, of which he was admittedly guilty. The *Poole* case would also have aided Wachtler in defending against a civil action, alleging intentional infliction of emotional distress or a similar theory of recovery.

The failure of a judge of a state's highest appellate court to recuse himself from considering and participating in the resolution of an appeal in which he had a "direct, personal, substantial pecuniary interest" was held to warrant the granting of reargument in *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813, 106 S. Ct. 1580

(1986) (hereinafter *Aetna*). In the *Aetna* case, the Supreme Court of the United States held that the appellant insurance company's due process rights under the Fourth Amendment were violated because Justice Embry of the Alabama Supreme Court participated in, and even wrote the majority opinion, in a case involving an insurance company's liability in a bad-faith refusal-to-pay lawsuit when that justice had himself commenced two similar lawsuits.

The *Aetna* court held that Justice Embry should have disqualified himself because he had a direct, personal and substantial pecuniary interest in the issues before the court due to the potential effect upon his own case of the precedent to be set by the Alabama Supreme Court in that case. *Aetna, supra,* 475 U.S. at 823-824, 106 S.Ct. at 1585-1587. In deciding that Justice Embry should have disqualified himself due to such interest, the *Aetna* court defined the nature of a disqualifying interest by employing terms which it had previously used in the case of *Ward v. Village of Monroeville,* 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972); *to wit*: "the situation is one 'which would offer a possible temptation to the average judge to. . . lead him not to hold the balance nice, clear and true' ". *Aetna, supra,* 475 U.S. at 822, 106 S.Ct. at 1585.

Among the factors which led the *Aetna* court to conclude that Justice Embry should have disqualified himself was the fact that a decision of the state's highest court was involved, and that the decision ". . . did not merely apply well-established law but quite possibly made new law . . .". *Aetna, supra,* 475 U.S. at 822, 106 S. Ct. at 1586.

In concluding that the participation of Justice Embry violated the Due Process Clause, the *Aetna* court noted that:

> [T]he Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of

> justice equally among the contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." ' [In Re] *Murchison,* 349 U.S. [133], 136, 75 S. Ct. [623], 625 (citations omitted).

Aetna, supra, 475 U.S. at 825, 106 S. Ct. at 1587. The *Aetna* court held that the remedy for such a constitutional violation was the vacation of the decision and the remanding for further proceedings in order to best serve "the appearance of justice." *Aetna, supra,* 475 U.S. at 828, 106 S. Ct. at 1588.

In the *Aetna* court's opinion, written by Chief Justice Burger, various rationales for the court's holding concerning the proper remedy were discussed, but the primary emphasis was placed upon "Justice Embry's leading role in the decision under review," and the fact that he was the author of the court's opinion. *Aetna, supra,* 475 U.S. at 828, 106 S.Ct. at 1588-1589. The majority opinion declined to rule upon what remedy would be appropriate if the case had not been decided in the Alabama Supreme Court by a 5-to-4 vote. However, the majority opinion did cite the case of *Oakley v. Aspinall,* 3 N.Y. 547 (1850) (*Aetna, supra,* 475 U.S. at 827, 106 S. Ct. at 1588), in which reargument was granted despite the existence of a unanimous decision in the Court of Appeals.

In addition, this issue was the subject of discussion in the concurring opinions of Justices Brennan and Blackmun. Justice Brennan's concurring opinion specifically stated that:

> Finally, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant—Justice Embry's participation in the court's resolution of the

> case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

475 U. S. at 830-831, 106 S. Ct. at 1590.

Justice Blackmun's opinion concurred with the concerns expressed by Justice Brennan:

> We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case. But we do know, from our own experience on this nine-member Court, that a forceful dissent may lead Justices to rethink their original positions and change

their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role, " *ante*, at 1589, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation. More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decision making process that is the hallmark of multi-member courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts

> to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.
>
> The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues.

Aetna, supra, 475 U.S. at 832-833, 106 S. Ct. at 1591.

The unprecedented arrest of Chief Judge Wachtler upon a charge of extortion of money based upon threats to use embarrassing surveillance photographs shortly after the decision was rendered in the instant case, and the prospect of future civil action against him, as well as his plea bargain to a non-extortion charge, raise many of the same issues of judicial interest and appearance of bias or prejudice which were present in the *Aetna* case.

At the time that the instant case was being considered by the Court of Appeals, former Chief Judge Wachtler realized or should have realized that if the threatening letters and phone calls received by "J.S." and her daughter were traced back to him, his lawyers, in defending against civil actions and the sort of extortion charge ultimately brought against him, may be obliged to cite the Court of Appeals' decision in the case at bar in an attempt to at least mitigate the egregious nature of his acts or the magnitude of his crime.

Under New York State law, Wachtler may be liable for punitive damages based upon a cause of action for intentional infliction of mental and emotional distress, arising out of a deliberate and malicious campaign of harassment and

intimidation. *See Green v. Fischbein Oliveri Rozenholc & Badillo,* 119 A.D. 2d 345, 507 N.Y.S. 2d 148, 152-153 (lst Dept. 1986). However, in order to establish a valid claim for punitive damages based upon extortion threats concerning surveillance, it would be necessary to prove that the conduct at issue constituted ". . . gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives." *Gravitt v. Newman,* 114 A.D. 2d 100, 495 N.Y.S. 2d 439, 441 (2nd Dept. 1985).

Because former Chief Judge Wachtler's acts were solely directed at his ex paramour and her daughter, and not at "the public generally", a punitive damages claim would stand or fall based upon proof of "evil or reprehensible motives". Whether or not Wachtler intended to use his surveillance materials would be an important issue in the determination of his motives. Former Chief Judge Wachtler would be expected to argue that he had no such evil or reprehensible motives, but rather that the degree his guilt was mitigated because his ultimate aim was not the extortion of money from "J.S.", but the resumption of his relationship with her, as Wachtler contended in open court after his guilty plea (69a, 71a). Wachtler claims that his intent was merely to convince her that she was being blackmailed by a Texas private detective, "David Purdy", in the hope that "J.S." would turn to him for protection against the unknown employer of "David Purdy". In gratitude for putting an end to the campaign of "David Purdy" against her, "J.S." would then resume her relationship with him.

In other words, he would be able to argue that there was no intent to use surveillance materials, either to embarrass "J.S." or to obtain money from her. He could then make favorable use of his own opinion in the *Poole* case to argue that the surveillance materials which he had gathered were inadmissible and that no mention could be made concerning them at trial because he had no intent to use them. That is, just as surveillance materials which

were not used by a defendant in a personal injury case could not be used or commented on by the plaintiff, the surveillance materials former Chief Judge Wachtler collected could not be used or commented upon in a civil action against him.

Given the fact that Wachtler was able to avoid pleading guilty to extortion, despite his admission that he had sent extortion letters to his former paramour, his attorney apparently was able to successfully argue that the degree guilt was mitigated, because former Chief Judge Wachtler's ultimate aim was not the extortion of money from "J.S.", but the resumption of his relationship with her.

The lawyer defending former Chief Judge Wachtler in the criminal action may well have been able to analogize Wachtler's case to the decision in the instant case by pointing out that in a civil case, if surveillance materials are created but not used, there cannot be so much as a mention of them at the trial and that, therefore, the parties must similarly proceed as if the surveillance materials never existed. Since Wachtler had no subjective intent to use surveillance materials to extort money, his threats to reveal compromising surveillance materials should be treated as if they were never made.

Whether or not Chief Judge Wachtler actually had such considerations in mind, his activities while the case at bar was before his Court were such that he could not consider the case in a proper, impartial judicial manner. The admissions made by Wachtler when he plead guilty to making an interstate kidnapping threat, as well as the fact that he was not required to plead guilty to extortion by virtue of the plea agreement, raise many of the same issues of judicial interest, as well as bias and prejudice, that were in issue in the *Aetna* case.

Under these circumstances, it should be assumed that he was

not able to make a decision upon a case in which surveillance was at issue which would not be affected by his own personal feelings on the subject.

It must be kept in mind that, as was true in the *Aetna* case, the New York State Court of Appeals was not merely following long-established legal precedent, but was resolving issues concerning discoverability and use of surveillance materials that had never been considered by that Court before.

In addition, in doing so, the Court of Appeals openly repudiated one long-established, 83-year-old precedent concerning the non-reviewability of summation comments by the Court of Appeals. (*Reehil v. Fraas*, 197 N.Y. 64 [1909]). The opinion also failed to follow prior precedents of the Court of Appeals concerning well-established legal principles to the effect that a negative inference may be drawn from an adverse party's failure to admit evidence that was presumptively in its favor (*Noce v. Kaufman*, 2 N.Y. 2d 347, 161 N.Y.S. 2d 1 [1952]) and the principle that no party has an exclusive proprietary right to the use of evidence (*Gilly v. City of New York*, 69 N.Y. 2d 509, 516 N.Y.S. 2d 166 [1987]).

The fact that the Court of Appeals' ruling, concerning the effect of the failure of a party to use its surveillance materials, broke new ground in New York State law rather than merely following long-established precedent, creates the appearance that Chief Judge Wachtler's own interest in the issue may have had an effect on the deliberations and decision of the Court of Appeals.

As was discussed in the concurrences of Justices Brennan and Blackmun in the *Aetna* case, reargument should be granted based upon the improper participation of former Chief Judge Wachtler in the hearing and decision of this case, rather than on speculation as to whether the individual vote of Chief Judge Wachtler was

"decisive" on the outcome of the case. No one outside of the Court of Appeals can know the tenor of its deliberations, what the tentative votes of the judges were in conference, or who, if anyone, played a "leading role" in reaching the end result. Thus, the focus should be on the improper participation of former Chief Judge Wachtler in the decision of the instant case, rather than upon the particular role he may have played in deciding its outcome.

Therefore, since Chief Judge Wachtler participated in the hearing and decision in the case when he should not have done so, the decision of the Court of Appeals should be viewed as being irregular, since the deceased plaintiff's right to due process under the law under the Fourteenth Amendment was violated.

CONCLUSION

Petitioner respectfully prays that this Court grant her petition for a write of certiorari to the end that this Court decide on the merits that petitioner's decedent, David Poole, was deprived of due process under the Fourteenth Amendment. The orders of the New York State Court of Appeals should be vacated, and the case should be reheard by the Court of Appeals.

Respectfully submitted,

PAUL W. BELTZ
Counsel of Record
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Attorney for Petitioner
36 Church Street
Buffalo, New York 14202
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APPENDIX A — ORDER OF THE NEW YORK COURT OF APPEALS GRANTING EXTENSION OF TIME DENYING REARGUMENT DATED FEBRUARY 18, 1993

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighteenth day of February A.D. 1993

Present, HON. RICHARD D. SIMONS, *Acting Chief Judge, presiding.*

Mo. No. 33

David L. Poole,

Respondent,

v.

Consolidated Rail Corporation,

Appellant.

A motion for extension of the time within which to move for reargument and for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the respondent herein, papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion for extension of the time within which to move for reargument be and the same hereby is granted; and it is

Appendix A

ORDERED, that the said motion for reargument be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B — OPINION AND ORDER OF THE NEW YORK COURT OF APPEALS DATED OCTOBER 20, 1992

STATE OF NEW YORK
COURT OF APPEALS

4 No. 183

Anthony J. DiMichel,

Respondent,

v.

South Buffalo Railway Company,

Appellant.

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4 No. 230

David L. Poole,

Respondent,

v.

Consolidated Rail Corporation,

Appellant.

No. 183:
Kevin A. Szanyi, for appellant.
Paul William Beltz, for respondent.
New York State Trial Lawyers' Association, *amicus curiae*.
Defense Trial Lawyers of Western New York, Inc., *et al.*, *amici curiae*.

No. 230:
Richard F. Griffin, for appellant.
Paul William Beltz, for respondent.

Appendix B

Defense Trial Lawyers of Western New York, Inc., *et al.*, *amici curiae*.

WACHTLER, CH. J.:

On these two appeals, we consider whether surveillance films prepared by a defendant in a personal injury action are discoverable by the plaintiff before trial. Surveillance films can serve a uniquely compelling function in a personal injury trial. They are designed to undermine, in a potentially sensational manner, a plaintiff's claims that he or she was seriously injured. At the same time, however, visual images are easily manipulated and can, as the result of skillful editing or crafty camera work, give a false depiction of a plaintiff's condition. Defense counsel argues that only by permitting a defendant to spring these films on the plaintiff at trial will the truth-seeking function of cross-examination be safeguarded. Plaintiffs' counsel, on the other hand, argues that because films are so easily manipulated, they must be disclosed before trial in order to permit counsel to verify the accuracy of the images portrayed.

At its most basic, this controversy requires us to fashion a rule that respects a defendant's qualified right to keep videotapes prepared in anticipation of litigation private, but that at the same time advances the policy of liberal disclosure underlying CPLR article 31. The Appellate Division held in both of these cases that the defendants would be obligated to disclose only those tapes which they planned to use at trial. Under the facts present here, we find this balance to be an appropriate one. Accordingly, in *DiMichel v. South Buffalo Railway Company*, we affirm. In *Poole v. Consolidated Rail Corporation*, however, because of trial errors we will discuss below, we reverse and remit for a new trial on both liability and damages.

Appendix B

I. *DiMichel v. South Buffalo Railway Company*

Plaintiff Anthony DiMichel commenced this action against South Buffalo Railway Company ("South Buffalo") in Supreme Court, Erie County, by service of summons and complaint dated January 16, 1986. Plaintiff alleged that on June 6, 1984, while employed by South Buffalo, he sustained injuries in a fall. DiMichel charged South Buffalo with violations of the Federal Employees' Liability Act, the Safety Appliance Act and the Boiler Inspection Act and asked for $500,000 in damages.

In the course of pre-trial discovery, plaintiff asked for disclosure of all videotapes or surveillance films that defendant may have taken of plaintiff. Without conceding that it in fact possessed surveillance materials, South Buffalo contended that any such material was not discoverable. Plaintiff then moved to compel disclosure. The trial court denied this motion.

Plaintiff moved to reargue the motion to compel after the Appellate Division, First Department held such films to be discoverable in *Marte v. W.O. Hickok Mfg. Co.* (154 AD2d 173). Upon reargument, the motion to compel disclosure was granted and defendant was ordered "to turn over to plaintiff for inspection and copying any and all videotapes and/or surveillance films of the plaintiff," but stayed this order pending appeal to the Appellate Division. The Appellate Division modified, with two Justices dissenting, holding that the defendant was obligated to turn over those surveillance materials it intended to use at trial, and that the defendant would be precluded from using any surveillance material it did not supply to plaintiff within 60 days of its order. The Appellate Division stated that the surveillance material constituted material prepared for litigation, "discoverable upon a showing that the party seeking discovery has a substantial need of

the materials in preparation of the case and is unable without undue hardship to obtain [their] substantial equivalent by other means" (CPLR 3101 [d][2]). The two dissenters would have held that plaintiff had failed to show factually that he had a substantial need for the material or that he was unable without undue hardship to obtain its equivalent. Defendant moved the Appellate Division for leave to appeal to this Court, and the Appellate Division certified the following question: "Was the order of this Court entered December 26, 1991 properly made?"

II. *Poole v. Consolidated Rail Corporation*

Plaintiff David Poole commenced this action in Supreme Court, Erie County, against his employer, Consolidated Rail Corporation ("Conrail"), charging that he had been seriously injured as the result of an August 22, 1985 fall from an allegedly defective ladder. In his verified complaint dated August 21, 1986, Poole alleged that Conrail had failed to provide plaintiff with a safe place to work and had failed to ensure that there were proper safety features on the job. Plaintiff asked for $1 million in damages, but in an amended complaint dated April 10, 1990, plaintiff increased the amount of damages sought to $5 million.

In the course of pre-trial discovery, plaintiff served a notice to produce dated November 20, 1989, which directed Conrail to turn over "all surveillance films, photographs, videotapes and related materials concerning . . . surveillance." Defendant moved for a protective order, but this motion was denied, and in an order dated June 8, 1990, plaintiff's request to view all surveillance films produced by defendant was granted.

At trial, plaintiff produced medical evidence to support his claims that he had sustained permanent and serious injury to his

back as a result of the accident. Further, plaintiff introduced evidence to establish that the accident had rendered him impotent. Defendant did not enter any surveillance material into evidence. The jury found in favor of plaintiff and awarded him $4,152,000 in damages.

Conrail appealed to the Appellate Division, which affirmed, with two Justices dissenting. The Appellate Division, citing *DiMichel*, which was decided at the same time, held that the lower court ruling that plaintiff was entitled to all surveillance material was too broad and should have been confined to that surveillance material which defendant had intended to use at trial. The court deemed this error to be harmless, however, "because the evidence of defendant's liability and plaintiff's damages was overwhelming and because plaintiff [sic] suffered no prejudice by the court's ruling" (178 AD2d 941, 942). The dissenting Justices would have held that the award deviated materially from what was reasonable compensation (CPLR 5501 [c]) and would have awarded defendant a new trial on damages. The defendant appealed to this Court as of right (CPLR 5601 [a]).

III.

As a preliminary matter, we note that, because of the procedural posture of each of these cases, the question before us is a rather narrow one. In each case, as noted above, the Appellate Division held that defendants had to turn over only those surveillance tapes that they intended to use at trial. Defendants appealed from this decision in both cases. Because any broadening of the scope of discovery authorized by the Appellate Division would, in effect, grant affirmative relief to plaintiffs, who are not appellants here (*Hecht v. City of New York*, 60 NY2d 57, 63), we cannot consider plaintiffs' arguments that they are entitled to view every surveillance film that defendants may have taken, regardless of whether defendants intend to use the films at trial.

Appendix B

Having acknowledged this procedural constraint, we now turn to the unique problems posed by surveillance films. Personal injury defendants secure surveillance materials in order to verify the extent of a plaintiff's purported injuries and introduce them because they are powerful and immediate images that cast doubt upon the plaintiff's claims. And indeed, if accurate and authentic, a surveillance film that undercuts a plaintiff's claims of injury may be devastatingly probative. At the same time, however, film and videotape are extraordinarily manipulable media. Artful splicing and deceptive lighting are but two ways that an image can be skewed and perception altered. As one court has noted, "[t]he camera may be an instrument of deception. It can be misused. Distances may be minimized or exaggerated. Lighting, focal lengths, and camera angles all make a difference. Action may be speeded up or slowed down. The editing and splicing of films may change the chronology of events. An emergency situation may be made to appear commonplace. That which has occurred once, can be described as an example of an event which recurs frequently . . . Thus, that which purports to be a means to reach the truth may be distorted, misleading and false" (*Snead v. American Export-Isbrandtsen Lines*, 59 FRD 148, 150).

Thus, while an accurate surveillance film may indeed prove to be a bombshell, the possibility of inaccuracy, given the nature of the medium, is very real. In resolving the question now before us, then, it is important to note that New York has long favored open and far-reaching pre-trial discovery. To a large extent, New York's open disclosure policy was intended to mark an end to the presentation of totally unexpected evidence and to substitute honesty and forthrightness for gamesmanship. To that end, CPLR 3101 (a) provides that "[t]here shall be full dislosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof." In *Allen v. Crowell-*

Appendix B

Collier Pub. Co. (21 NY2d 403, 407), this Court held that, in light of the statute's purpose and legislative history, "[t]he words, 'material and necessary' are . . . to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason" (*id.*, at 406-07; *see also, Rios v. Donovan*, 21 AD2d 409, 411 ["The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits"]).

Courts in this State that have considered the discoverability of surveillance tapes have turned to two separate subsections of CPLR 3101: CPLR 3101 (d)(2) and CPLR 3101 (e) (*see, e.g., Lorino v. Manhattan and Bronx Surface Transit Operating Authority*, NYLJ, Mar. 15, 1990, at 24, col 5 [CPLR 3101 (d)(2)]; *Prewitt v. Beverly-50th St. Corp.*, 145 Misc 2d 257 [both]). CPLR 3101 (d)(2) provides that materials otherwise discoverable under subdivision (a) which were prepared in anticipation of litigation or for trial are obtainable only upon a showing that "the party seeking discovery *has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means*" (emphasis added). CPLR 3101 (e), unlike subsection (d)(2), is in no way qualified; it gives a party an absolute right to obtain a copy of his or her own statement.

The first surveillance film case to reach the Appellate Division was *Marte v. W.O. Hickok Mfg. Co., supra*. In *Marte*, the Appellate Division, First Department held that surveillance tapes were discoverable because they constituted statements of the plaintiff under CPLR 3101 (e) (*id.*, at 177). In reaching its decision, the Appellate Division cited an earlier decision, *Saccente v. Toterhi*

(35 AD2d 692), in which the Appellate Division had held that a photograph of the plaintiff that had been taken a short time after the accident in question, some four years before trial, was a visual or photographic statement made by plaintiff, and therefore discoverable under subsection (e) (*id.*).

The Appellate Division, Fourth Department expressly refused to follow the lead of the First Department in one of the two cases now before us, *DiMichel v. South Buffalo Railway Co.* The court declined to consider surveillance films as statements for purposes of CPLR 3101 (e), instead treating them as material prepared for litigation to which a qualified privilege attached (CPLR 3101 [d][2]). In concluding that the material was discoverable, the Court held that the substantial need and undue hardship requirements had been satisfied: "[i]t cannot be gainsaid that plaintiff has a substantial need for discovery of the surveillance materials based on the fact that 'visual reproductions may not always provide a correct picture of what they purport to depict since they are subject to manipulation' . . . For that same reason, it is impossible for plaintiff to obtain the substantial equivalent of the surveillance materials by other means" (*id., quoting Marte, supra,* at 176; *citing Snead v. American Export-Isbrandtsen Lines, supra,* at 148).

In *Careccia v. Enstrom* (174 AD2d 48), the Appellate Division, Third Department agreed with the Fourth Department that surveillance tapes were not party statements for purposes of CPLR 3101 (e), but were instead material prepared in anticipation of litigation under CPLR 3101 (d)(2). The court held that surveillance videotapes were analogous to the statements and reports of an investigator hired by defendant to observe plaintiff's activities, which fall within the scope of CPLR 3101 (d)(2) (*id.* at 50). Expressly disavowing the Fourth Department's holding in *DiMichel*, however, the Third Department stated that since the

party seeking discovery has the burden of proving substantial need and hardship (*see, e.g., Thibodeau v. Rob Leasing*, 88 AD2d 1085), the Court was "unwilling to conclude that the elements necessary for an order for production under CPLR 3101 (d)(2) are inherent in the very nature of the visual evidence, for such a conclusion would effectively rewrite the statute to create another exception to the rule governing material prepared for litigation . . . which is the function of the Legislature, not the courts." Specifically, the court rejected the argument that the plaintiff had a substantial need for disclosure in order to verify the accuracy of the videotape, holding that authenticity could be verified through voir dire and cross-examination of the person who had made the videotape (*Careccia, supra*, at 51).

Finally, the Appellate Division, Second Department has also held that surveillance films constitute material prepared for litigation to which a qualified privilege attaches (*Kane v. Her-Pet Refrigeration*, __AD2d__ [2d Dept. July 27, 1992]). That court, however, agreed with the analysis of the Appellate Division, Fourth Department in *DiMichel*, holding that "[a]lthough surveillance evidence constitutes material obtained in preparation for litigation, its protected status is overcome here by the plaintiffs' substantial need to verify the accuracy of the potentially devastating films prior to trial."

This is clearly an issue that has fragmented the four departments of the Appellate Division. To review briefly, the First Department would treat surveillance films as discoverable in their entirety pursuant to CPLR 3101 (e), which governs party statements. The Second Department followed the lead of the Fourth Department in *DiMichel* by treating surveillance films as material prepared for litigation and by holding that substantial need and undue hardship inhered in the nature of the films

themselves. Finally, the Third Department, while also treating these films as material prepared for litigation, held that such films were discoverable only upon a showing of substantial need and undue hardship.

Having considered the different approaches, we agree with the Second, Third and Fourth Departments that surveillance films should be treated as material prepared in anticipation of litigation, and as such, are subject to a qualified privilege that can be overcome only by a factual showing of substantial need and undue hardship.

That the plaintiffs in both of these cases have a substantial need to view surveillance films before trial is manifest. Because films are so easily altered, there is a very real danger that deceptive tapes, inadequately authenticated, could contaminate the trial process. The question that remains, therefore, is whether plaintiffs confronted with surveillance films for the first time at trial would have an adequate opportunity to ascertain the films' accuracy and authenticity. The dissenters in *DiMichel* and the Third Department in *Careccia* believed so, reasoning that surveillance films could be authenticated at trial through voir dire or cross-examination of the person who had made the film. On balance, however, we disagree. Authentication of surveillance films can be a slow and painstaking process, and because of the potentially devastating effects of such evidence, it would be improper to curtail a plaintiff's efforts to do so. Thus, a plaintiff, confronted with a surveillance film at trial, would certainly be entitled to a continuance to examine the video evidence. Indeed, it would appear to be well within the discretion of a Trial Judge, under certain circumstances, to give plaintiff an extended continuance in order to retain an expert who could ascertain the authenticity of proferred video evidence. Thus, if defendants were allowed to withhold surveillance evidence until

trial, personal injury trials could be routinely disrupted and delayed.

Further, a plaintiff confronted with altered video evidence for the first time at trial would likely be prejudiced by the apparent weight and authority of such evidence. Even if after careful examination plaintiff was able to demonstrate that the evidence had indeed been distorted, it would be difficult to undo its initial impact and to erase the impression left in the minds of the jury members.

Defendants dispute plaintiffs' claims of substantial need, arguing that the real reason they seek to obtain the tapes prior to trial is to learn what evidence the defendants intend to produce at trial so that they may tailor their trial testimony accordingly. This, defendants argue, would greatly impair the truth-finding function of cross-examination. This argument, however, is flawed for at least two reasons. First, it runs counter to New York's open pre-trial disclosure policy, as discussed earlier. Clearly, to permit defendants to withhold this evidence until trial, even for the ostensible purpose of promoting vigorous cross-examination, would be to return to an earlier time, when subterfuge and surprise were common trial strategies. Second, it is persuasive only if we assume that surveillance tapes are always accurate and plaintiffs always dishonest. As noted above, however, surveillance films are extraordinarily susceptible to manipulation, and, once altered, are peculiarly dangerous. Thus, we cannot fashion a rule that is premised upon their authenticity, as defendants urge. However, the danger identified by defendants is a real one. We believe that it can be largely eliminated by providing that surveillance films should be turned over only after a plaintiff has been deposed.

We further find that plaintiffs have established that they

cannot without undue hardship obtain the substantial equivalent of surveillance materials by other means. Although plaintiffs are aware of their own physical ailments and the nature of their disabilities, this is no substitute for viewing the surveillance materials taken by the defendants. It is only by viewing the surveillance film that plaintiffs can determine when it was made and whether the activities depicted were typical of that time or were the product of an emergency situation.

Visual evidence of this kind is unique because it memorializes a particular set of conditions that can likely never be replicated. Only by observing the conditions as they appear on film can the plaintiffs respond to possible distortions or prepare to explain seeming inconsistencies to the jury. Thus, we conclude that the second prong of CPLR 3101 (d)(2) has also been satisfied.

In *DiMichel v. South Buffalo Railway Co.*, the sole issue was the discoverability of the surveillance tapes. Having concluded that the plaintiff was entitled to view those tapes that the defendant intended to use at trial, if indeed any such tapes exist, our analysis in that case is at an end. Accordingly, the order of the Appellate Division should be affirmed and the certified question answered in the affirmative.

One issue remains to be discussed in *Poole v. Consolidated Rail Corporation*, however. Having examined the record and considered the parties' arguments, we remain greatly troubled by both trial tactics employed by plaintiff's counsel in this case and certain rulings made by the trial judge. Although the Appellate Division concluded the lower court had erred in ordering full discovery of all surveillance tapes, the Appellate Division, in conducting its harmless error analysis, found the trial errors cited by defendant not so egregious as to require a new trial. We

disagree. We believe that these errors permeated the trial and created a climate of hostility that effectively destroyed the defendant's ability to obtain a fair trial.

We are most troubled by three separate errors. The first relates directly to our decision regarding the discoverability of the surveillance tapes. As we noted earlier, the defendant here did not introduce surveillance material into evidence at trial. Plaintiff's counsel, however, referred specifically and repeatedly to the fact that such films had been taken. In fact, in his summation, plaintiff's attorney alluded to the existence of surveillance films and theorized that the defense did not introduce the surveillance tapes into evidence because they did not support the defendant's case. This tactic was the subject of a mistrial motion brought by defendant's counsel upon the completion of the summation.

This conduct was highly prejudicial, and, we conclude, improper. Defendant was, as the dissent noted, "twice injured by the court's ruling that permitted the jury to speculate about what the tapes depicted and permitted it to infer that, if the tapes had been produced, they would have supported plaintiff's contentions" (178 AD2d, at 943).

More fundamentally, however, we are troubled by these tactics because they unravel the careful compromise we have crafted today. In holding that the plaintiff here was entitled to obtain those surveillance materials that defendant planned to use at trial, on direct or cross-examination, we have attempted to reconcile defendant's interests in keeping matter prepared in anticipation of litigation private with plaintiff's need to authenticate easily distorted visual evidence. We have been guided by a policy of liberal disclosure, and we seek above all else to ensure that both plaintiff and defendant receive a fair trial.

Appendix B

Plaintiff's counsel here appears to have used this spirit of openness and liberality as a cover for tactics that effectively undermined the ultimate fairness of this trial. Defendant decided, for whatever reason, that the surveillance tapes did not help his case. That should have ended the matter. To permit the plaintiff to profit from his knowledge of the content and existence of such tapes in this manner would enable him, by virtue of open pre-trial disclosure, to engage in the sort of gamesmanship that we are seeking to discourage in the defendant. Thus, we hold as a matter of law that where surveillance films have been duly turned over to the plaintiff pursuant to our decision today, and the defendant decides subsequently, as a matter of trial strategy, not to use such films at trial, plaintiff cannot turn this strategy to his or her advantage and comment on this decision to the jury.

The second error does not relate to the surveillance film issue, but is, in our opinion, more egregious. Defense counsel had been unable to produce at trial the man who had served as Conrail's foreman at the time of the accident because he was undergoing open heart surgery. Defense counsel sought to introduce medical evidence to this effect to the jury, but the trial court sustained the plaintiff's objections. At trial, plaintiff's counsel elicited testimony from a Conrail employee that the foreman had ordered him to destroy the ladder from which the plaintiff had fallen. In his summation, he repeatedly portrayed the foreman as reluctant to talk about the case and went so far as to argue that defendant did not produce the foreman in an effort to cover up the real facts behind the accident. An objection to the latter point was sustained, and the jury instructed to ignore it, but in his mistrial motion, defendant's counsel referred specifically to these comments and to the court's having prevented defendant from revealing to the jury the real reason behind the foreman's inability to appear.

Appendix B

These references in counsel's closing statement and the court's decision precluding the admission of medical testimony were both clearly improper. We find that they too contributed to a climate of hostility that acted to deprive the defendant of a fair trial.

Lastly, we agree with the dissenters below that the trial judge abused his discretion when he prevented the defendant's experts from testifying as to the amount that plaintiff could have been expected to earn from alternative employment. Prior to trial, defendant had sought to have plaintiff examined by its vocational expert, but the court granted plaintiff's motion for a protective order. During cross-examination of this expert, however, plaintiff's counsel repeatedly attempted to discredit this expert based upon his failure to have conducted such an examination and his consequent reliance upon documentation provided by defendant. Thus, not only was the defense precluded from offering relevant evidence regarding plaintiff's future earning power, but this error was compounded by plaintiff's efforts to portray the vocational expert's testimony as incomplete and unreliable because of the expert's failure to conduct an examination that was adamantly and successfully opposed by plaintiff.

We believe that these errors, taken together, deprived defendant of a fair trial and cannot be considered harmless. Under the facts present here, the trial court abused its discretion in denying defendant's motion for a mistrial.[1] The defendant is therefore entitled to a new trial on both liability and damages. Because we reverse and remit for a new trial, we do not reach defendant's other claims.

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1. To the extent that our decision in *Reehil v. Fraas* (197 NY 64) states that exceptions to improper summation comments raise no question of law reviewable by this Court, it is no longer to be followed.

Appendix B

Accordingly, in *DiMichel v. South Buffalo Railway Co.*, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative. In *Poole v. Consolidated Rail Corporation*, the order of the Appellate Division should be reversed, with costs, and a new trial granted.

Appendix B

Remittitur

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Sol Wachtler, Chief Judge, Presiding

4 No. 230

David L. Poole,

Respondent,

v.

Consolidated Rail Corporation,

Appellant.

The appellant in the above entitled appeal appeared by Phillips Lytle Hitchcock Blaine & Huber, Esqs.;
the respondent appeared by Paul William Beltz, P.C.; and amicus curiae appeared by O'Shea, Reynolds, Napler, Cummings & Kirby.

The Court, after due deliberation, orders and adjudges that the order is reversed, with costs, and a new trial granted. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Smith took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Erie County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be fiied are attached .

Appendix B

s/ Donald M. Sheraw
Donald M. Sheraw, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 20, 1992.

* * *

No. 183: Order affirmed, with costs, and certified question answered in the affirmative. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Smith took no part.

No. 230: Order reversed, with costs, and a new trial granted. Opinion by Chief Judge Wachtler. Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Smith took no part.

Decided October 20, 1992

APPENDIX C — OPINION OF THE NEW YORK SUPREME COURT APPELLATE DIVISION FOURTH DEPARTMENT

1284. (Erie Co.) — DAVID L. POOLE, RESPONDENT, V CONSOLIDATED RAIL CORPORATION, APPELLANT. APPEAL NO. 2. — Judgment affirmed without costs. Memorandum: On August 22, 1985 plaintiff was injured during the course of his employment with defendant when he fell off a ladder while working inside a gondola car. Plaintiff commenced this action alleging that the wood ladder was unsafe because it was not properly weatherproofed and coated with linseed oil as required by the company safety regulations. The jury awarded plaintiff damages in the amount of $4,152,000. On appeal, defendant argues that the court erred in various disclosure and evidentiary rulings, that the conduct of plaintiff's counsel in examining defendant's claims agent and in summation was improper and prejudicial, that the court's charge was erroneous and that the verdict was excessive.

The court properly allowed plaintiff to produce two Reports of Unsafe Conditions dated June 12 and July 10, 1985 in which a fellow employee complained about using wood ladders that had been treated with a preservative. That proof did not materially vary from the allegations in plaintiff's bill of particulars and was not prejudicial to defendant (*see,* Noce v. Kaufman, 2 NY2d 347). Furthermore, the court did not abuse its discretion in refusing to allow defendant to present evidence of the unavailability of its foreman. The proffered testimony was not material to the central issue in the case, namely, the condition of the ladder and defendant's failure to use a preservative. The damages were not excessive. Plaintiff was 33 years of age when the accident occurred and suffered serious and permanent injuries, including a herniated disk, nerve root compression, radiculopathy and sexual impotence. The awards for pain and suffering, economic loss and

medical expenses were supported by the evidence and within the range of the expert testimony. The court's ruling permitting plaintiff discovery of all surveillance material obtained by defendant was too broad and should have been confined only to surveillance materials defendant intended to use at trial (*see*, DiMichel v. South Buffalo Railway Co., __ AD2d __ [decided herewith]). That error, however, was harmless because the evidence of defendant's liability and plaintiff's damages was overwhelming and because plaintiff suffered no prejudice by the court's ruling. The court's charge was proper in all respects and the conduct of plaintiff's counsel was not so egregious to require reversal (*see*, Eschberger v. Consolidated Rail Corp., __ AD2d __, [decided June 7, 1991]). Defendant's remaining contentions lack merit.

All concur, except Boomer and Lawton, JJ., who dissent in part and vote to modify, in the following Memorandum: We dissent in part. The jury's award of $4,152,000, arrived at after less than two hours of deliberation, deviates materially from what is reasonable compensation (CPLR 5501 [c]). The jury's awards of $1,900,000 for future pain and suffering, $1,476,000 for future lost wages, and $500,000 for future medical expenses are grossly excessive. That is especially true given the fact that those awards were adjusted to present day value.

Plaintiff's injuries, while serious, do not support the individual awards. Plaintiff was awarded $500,000 for future medical expenses and $1,900,000 for future pain and suffering, despite the proof that his injuries did not require his hospitalization and he never underwent a single surgical procedure. Plaintiff's medical bills during the five-year period between the date of the accident and the jury's verdict were only $12,000. Further, the jury's $1,900,000 award for future pain and suffering is

inconsistent with its award of $100,000 for plaintiff's pain and suffering for the five years immediately after the accident. The award of $1,476,000 for future lost wages was also grossly excessive because plaintiff's average earned income for the three years preceding the accident was only $10,325. Further, the proof established that plaintiff, while unable to continue working on the railroad, was not precluded from sedentary or light work in the future. That excessive award was the product of Supreme Court's erroneous exclusion of defendant's proof of the amount that plaintiff could reasonably be expected to earn in alternate employment; thus, the jury was left to consider only the proof offered by plaintiff.

Indeed, those excessive awards can be explained only as being the result of prejudice introduced into the action by reason of erroneous court rulings and unfair tactics employed by plaintiff's counsel during trial and on summation. In this regard, Supreme Court erred in permitting plaintiff's counsel continuously to state or imply during trial that defendant wrongfully withheld evidentiary material from plaintiff during the discovery period, when in fact it properly withheld that evidence pursuant to court orders of protection (*see*, Kavanaugh v. Nussbaum, 129 AD2d 559, 561, *mod. on other grounds* 71 NY2d 535). Likewise, Supreme Court erroneously granted an order requiring production by defendant, prior to trial, or all surveillance tapes of plaintiff (*see*, DiMichel v. South Buffalo Railway Corp., __ AD2d __ [decided herewith]). Despite the fact that defendant never offered the tapes into evidence, plaintiff's attorney commented on their existence and defendant's failure to introduce them into evidence much the same as one would comment on a missing key witness. Defendant was thus twice injured by the court's ruling that permitted the jury to speculate about what the tapes depicted and permitted it to infer that, if the tapes had been produced, they would have supported

plaintiff's contentions. Additionally, the summation of plaintiff's attorney inflamed the jurors with repeated allegations of defendant's wrongfully withholding evidence. The summation of plaintiff's attorney was also replete with improper comments, misrepresentations of the evidence, references to nonevidentiary material, vouching for witnesses' credibility and references to private opinion (*see,* Berkowitz v. Marriott Corp., 163 AD2d 52; Giuamara v. O'Donnell, 96 AD2d 1049; Laughing v. Utica Steam Engine & Boiler Works, 16 AD2d 294). Plaintiff's counsel went so far as to berate defendant in summation for its failure to produce its foreman, Mr. Fusco, at trial, even though counsel's objection, erroneously sustained by the court, precluded evidence that Fusco was unable to attend the trial due to open heart surgery (*see,* People v. Geoghegan, 68 AD2d 279, 286, *aff'd* 51 NY2d 45).

While none of the aforesaid tactics and rulings, standing alone, would constitute reversible error, when taken in concert they create a climate of hostility against defendant, which prevented it from receiving a fair trial. In short, the verdict that awarded to plaintiff all that he asked was not compensatory but was punitive in nature. We would modify the judgment by ordering a new trial on the issue of damages. (Appeal from Judgment of Supreme Court, Erie County, Flaherty, J. – Negligence.) PRESENT: CALLAHAN, J.P., BOOMER, GREEN, LAWTON, DAVIS, JJ.

APPENDIX D — JUDGMENT OF THE NEW YORK SUPREME COURT, COUNTY OF ERIE DATED NOVEMBER 2, 1990

STATE OF NEW YORK
SUPREME COURT: COUNTY OF ERIE

Index No. H-77417

DAVID L. POOLE

Plaintiff

-vs-

CONSOLIDATED RAIL CORPORATION

Defendants

JUDGMENT
AND BILL OF COSTS

The issues in the above-entitled action having duly come on for trial before HONORABLE THOMAS P. FLAHERTY, Justice of the Supreme Court, Erie County, and a jury in the Supreme Court, on June 18, 1990, and the parties having appeared in person and by their attorneys and the allegations and proofs of the parties having been heard; and the issues in said action having been duly submitted to the jury, and the jury having returned a verdict in favor of the plaintiff David L. Poole and against the defendants CONSOLIDATED RAIL CORPORATION in the sum of $4,152,000.00 and said verdict having been duly entered in the minutes of the court;

And the costs and disbursements of the plaintiff in said action having been duly taxed in the sum of $2,118.50; and

Appendix D

Interest thereon being taxed on the verdict from the date of June 10, 1990, to date, in the sum of $117,734.70; it is hereby

ADJUDGED that the plaintiff David L. Poole of 61 Marlow Road, West Seneca, N.Y. 14224 does recover of the defendant CONSOLIDATED RAIL CORPORATION (Conrail), Main-Seneca Building, Buffalo, N.Y. 14203 the sum of $4,152,000.00 together with interest thereon up to the present in the sum of $117,734.70; and it is further

ADJUDGED that the plaintiff David L. Poole does recover of the defendants Consolidated Rail Corporation costs and disbursements as taxed herein in the sum of $2,118.50; and that plaintiff has execution therefor in the total sum to date of $4,271,853.20 against the defendant.

Judgment signed and filed this
2 day of November, 1990

s/ David Swartz
Erie County Clerk

APPENDIX E — ORDER OF THE NEW YORK SUPREME COURT, COUNTY OF ERIE DATED DECEMBER 15, 1992

At a term of the Appellate Division, Fourth Department, held at the Buffalo City Court Building in Buffalo, New York on December 15, 1992

PRESENT: *HON. Nelson H. Cosgrove, J.S.C.*
Justice Presiding

STATE OF NEW YORK:
SUPREME COURT COUNTY OF ERIE

Index NO. H-77417
Cal. NO. 89-2084

DAVID POOLE

Plaintiff

-vs-

CONSOLIDATED RAIL CORPORATION

Defendant

ORDER

Plaintiff having moved for an order substituting Kathleen Poole as Administratrix of the estate of David L. Poole, and the motion having come on regularly to be heard;

Now upon reading and filing the Order to Show Cause dated December 11, 1992, the affidavit of Paul W. Beltz, sworn to on

Appendix E

December 11, 1992 with exhibits thereto attached, in support of said motion, and

Now upon hearing PAUL WILLIAM BELTZ, P.C. (Paul W. Beltz, of counsel) in support of said motion, it is hereby

ORDERED that the plaintiff's motion is granted, and it is further

ORDERED that the title of said action shall read:

KATHLEEN POOLE, Administratrix of the
Estate of David L. Poole, Dec.
Plaintiff

-vs-

Consolidated Rail Corporation
Defendant

s/ Nelson H. Cosgrove
Justice of the Supreme Court

[stamped]
GRANTED
ENTER: DEC 15 1992
PATRICIA L.(eligible)
COURT CLERK

APPENDIX F — EXCERPTS OF AFFIDAVIT OF PAUL W. BELTZ IN SUPPORT OF MOTION FOR REARGUMENT IN THE COURT OF APPEALS

IV. IMPROPER PARTICIPATION IN DECISION OF APPEAL BY CHIEF JUDGE WACHTLER

Finally, reargument should be granted due to the revelations which have come to light due to the arrest and arraignment of Chief Judge Wachtler after this Court's decision, upon a charge of extortion premised upon the making of a demand for $20,000 to his ex-paramour in exchange for the delivery of embarrassing surveillance materials to her. As has been reported, the criminal complaint charges the former Chief Judge with making threats by phone and letters concerning surveillance materials throughout the pendency of this appeal before this Court, and even delivering an extortion letter on September 12, 1992, the day after the oral argument of this appeal.

Chief Judge Wachtler should have recused himself from this appeal, and his failure to do so violated plaintiff's right to due process under the Fourteenth Amendment to the United States Constitution, as well as creating an appearance of impropriety under these unusual circumstances. He should have realized that in the event of the institution of felony extortion charges against him, such as those which, shortly followed this Court's decision, the precedent established concerning an opposing party's inability to use or even comment upon surveillance materials, if the party creating them does not use them, would be subject to use in a defense against criminal prosecution, either as to his guilt or in a claim that non-use of such materials should be considered as a mitigating factor.

The failure of a judge of a state's highest appellate court to recuse himself from considering and participating in the resolution

of an appeal in which he had a "direct, personal, substantial pecuniary interest" was held to warrant the granting of reargument in *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986) (hereinafter *Aetna.*)

In the *Aetna* case, the Supreme Court held that the appellant insurance company's due process rights under the Fourth Amendment were violated because a justice of the Alabama Supreme Court participated in, and even wrote the majority opinion, in a case involving an insurance company's liability for a bad-faith refusal-to-pay lawsuit when that justice had himself commenced two similar lawsuits.

The *Aetna* court held that Justice Embry should have disqualified himself because he had a direct, personal, substantial pecuniary interest in the issues before the court due to the potential effect of the precedent in the case before the Alabama Supreme Court upon his own case. *Aetna, supra*, 475 U.S. at 823-824, 106 S.Ct. at 1585-1587. In deciding that Justice Embry should have disqualified himself due to interest, the *Aetna* court defined the nature of a disqualifying interest in terms it had previously used in the case of *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972):

> [the] situation is one 'which would offer a possible temptation to the average judge to. . . lead him not to hold the balance nice, clear and true.'

Aetna, supra, 475 U.S. at 822, 106 S.Ct. at 1585.

Among the factors which led the *Aetna* court to conclude that Justice Embry should have disqualified himself was the fact that a

decision of the state's highest court was involved, and that the decision ". . . did not merely apply well-established law but quite possibly made new law . . ." *Aetna, supra,* 475 U.S. at 822, 106 S.Ct. at 1586.

In concluding that the participation of Justice Embry violated the Due Process Clause, the Aetna court noted that:

> [T]he Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally among the contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice." ' [In Re] *Murchison,* 349 U.S. [133], 136, 75 S.Ct. [623], 625 (citations omitted).

Aetna, supra, 475 U.S. at 825, 106 S.Ct. at 1587.

The *Aetna* court held that the remedy for the constitutional violation was the vacation of the decision and remanding for further proceedings in order to best serve "the appearance of justice." *Aetna, supra,* 475 U.S. at 828, 106 S.Ct. at 1588.

In the *Aetna* court's opinion, written by Chief Justice Burger, various rationales for the court's holding concerning the proper remedy were discussed, and most emphasis was placed upon "Justice Embry's leading role in the decision under review," and the fact that he was the author of the court's opinion. *Aetna, supra,* 475 U.S. at 828, 106 S.Ct. at 1588-1589. Chief Justice Burger refused to rule upon what remedy would be appropriate if the case had not been decided in the Alabama Supreme Court by a 5-to-4 vote.

However, this issue, directly implicated in the instant case, was the subject of discussion in the concurring opinions of Justices Brennan and Blackmun. In addition, the opinion of Chief Justice Burger cited the case of *Oakley v. Aspinall*, 3 N.Y. 547 (1850) (*Aetna, supra*, 475 U.S. at 827, 106 S.Ct. at 1588), in which this Court was confronted with the question in the context of a unanimous decision.

Justice Brennan stated that:

> Finally, I understand that the Court's opinion is not to be read to suggest that the outcome might be different had Justice Embry not provided the necessary fifth vote in the court below. That fact too is irrelevant—Justice Embry's participation in the court's resolution of the case, while he was fully aware of his interest in its outcome, was sufficient in itself to impugn the decision. The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a

> judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Aetna, supra, 475 U.S. at 830-831, 106 S.Ct. at 1590.

Justice Blackmun concurred with the concerns expressed by Justice Brennan:

> We cannot know what led each justice on the Alabama Supreme Court to the position he or she reached in this case. But we do know, from our own experience on this nine-Member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive "leading role," *ante,* at 1589, ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes. It makes little sense to intimate that if Justice Embry's dissent had led two colleagues to switch their votes, and the final vote had been 6 to 3, Aetna would somehow not have been injured by his participation.
>
> More importantly, even if Justice Embry had not written the court's opinion, his participation in the case would have violated

the Due Process Clause. Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case. We should not attempt the perhaps futile task of distilling Justice Embry's particular contribution to determine whether the result would have been the same had he disqualified himself at the outset. I would not want other appellate courts to read the Court's opinion today to suggest that such an inquiry provides an appropriate guarantee of due process.

The violation of the Due Process Clause occurred when Justice Embry sat on this case, for it was then the danger arose that his vote and his views, potentially tainted by his interest in the pending Blue Cross suit, would influence the votes and views of his colleagues.

Appendix F

Aetna, supra, 475 U.S. at 832-833, 106 S.Ct. at 1591.

In *Oakley v. Aspnall,* 3 N.Y. 547 (1850), a judge of this Court had participated in the decision of an appeal, despite the fact that he was related to the appellant within the seventh degree, and was therefore disqualified to sit as a judge and take part in the decision. The judge in question had offered to disqualify himself, but counsel for both parties consented to having the judge sit, with the counsel for respondent, who later argued for vacation of the court's order due to the disqualification of the judge, particularly arguing that the disqualification should be ignored. *Oakley, supra,* 3 N.Y. at 548-549. The decision against the respondent was unanimous. *Oakley, supra,* 3 N.Y. at 555-556.

In spite of the fact that it was ". . . difficult, under the circumstances, to view this application with favor . . . " (*Oakley, supra,* 3 N.Y. at 549), since the complaining party was mostly responsible for the sitting of the disqualified judge, the *Oakley* court held that the underlying principles implicated by the sitting of a disqualified judge must govern. The *Oakley* court first noted that "[t]he first idea in the administration of justice is that a judge must necessarily be free of all bias and partiality." *Oakley, supra,* 3 N.Y. at 549.

It was observed that when a judge is cognizant of a disqualifying circumstance, it is the judge's obligation to raise the issue. "Nor ought he wait to be put in mind of his disability, but should himself suggest it and withdraw . . ." 3 N.Y. at 551.

The *Oakley* court noted that concerns about disqualifications are particularly acute in a court such as the Court of Appeals. "The law applies as well to all members of this Court as to any other; or if there is any difference it is rather in favor of its more stringent

application to judges of a court of last resort, as well, because of its greater dignity and importance as a tribunal of justice, as there is no mode of redress appointed for the injuries which its biased decisions may occasion." *Oakley, supra,* 3 N.Y. at 551-552.

The *Oakley* court held that the remedy for having a disqualified judge participating in the decision was a vacation of the decision and the granting of reargument, since the improper participation of the judge was such that no proper determination was made upon the appeal:

> It appearing then that Judge Strong could neither lawfully hear nor take part in the decision of this case—but that he did both—I am of the opinion that no proper determination has been made upon this appeal—that the judgment thus inadvertently entered, and the remittitur, ought to be vacated, and that the cause ought to be reargued.

Oakley, supra, 3 N.Y. at 555.

The unprecedented arrest and arraignment of Chief Judge Wachtler upon a charge of extortion of money based upon threats to use embarrassing surveillance photographs shortly after the decision was rendered in the instant case raises many of the same issues of judicial interest and appearance of bias or prejudice which were present in the *Aetna* and *Oakley* cases.

At the time that the instant case was being considered by this Court, Chief Judge Wachtler should have realized that if the threatening letters and phone calls received by "JS" and her daughter were traced back to him, his lawyer, in defending against

this sort of extortion charge ultimately brought against him, may be obliged to cite this Court's decision in an attempt to at least mitigate the magnitude of the crime.

It may be argued that the quality of guilt is mitigated because Chief Judge Watchler's ultimate aim was not the extortion of money from "J.S.", but the resumption of his relationship with her. He would argue that his intent was merely to convince her that she was being blackmailed by a Texas private detective, "David Purdy", in the hope that "JS" would turn to him for protection against the unknown employer of "David Purdy." In gratitude for the end of the campaign of "David Purdy" against her, "JS" would then resume the relationship.

If such a defense is advanced, it would be argued that there was never any actual intent to publicize embarrassing photographs. In other words, there was no intent to use surveillance materials, either to embarrass "J.S." or to obtain money from her. In support of such a defense, the lawyer defending Chief Judge Wachtler would be obliged to cite the decision in the instant case and point out that in a civil case, if surveillance materials are created but not used, there cannot be so much as a mention of them at the trial, and the parties must proceed as if the surveillance materials never existed.

The precedent established by this Court concerning non-use of surveillance materials would be even more applicable in the context of a civil suit brought by "J.S." and her daughter in the courts of this state, seeking compensatory and punitive damages from Chief Judge Wachtler. Whether or not surveillance materials were "used" would be especially relevant concerning whether "J.S."and her daughter should receive punitive damages, and if so, the magnitude of such an award.

Appendix F

Whether or not Chief Judge Wachtler actually had such considerations in mind, his activities while the case at bar was before this Court put him in an impossible position, and the revelations and accusations arising from his arrest and arraignment have called into question whether the appearance of justice has been served.

It must be kept in mind that, as was true in the *Aetna* case, this Court was not merely following long-established legal precedent, but was resolving issues concerning discoverability and use of surveillance materials that had never been considered by this Court before. In fact, as was noted above, this Court openly repudiated one long-established precedent, that of the *Rehill* case, and also failed to follow the precedents of the *Noce* and *Gilly* cases.

The fact that this Court's ruling concerning non-use of surveillance materials when the opposing party did not use them broke new ground in the law of this state, and was not merely based upon long-established precedent, creates the appearance that Chief Judge Wachter's own interest in the issue may have had an effect on the deliberations and decision of this Court.

As was discussed in the concurrences of Justices Brennan and Blackmun in the *Aetna* case, and as was likewise held by this Court in the *Oakley* case, reargument should be granted based upon the improper participation in the hearing and decision of this case, rather than on speculation as to whether the individual vote of Chief Judge Wachtler was "decisive" of the outcome of the case.

No one outside of this Court can know the tenor of its deliberations, what the tentative votes of the judges were in conference, or who played a "leading role" in reaching the end result. Therefore, the focus should be in the improper participation

of Chief Judge Wachtler in the decision in the case, rather than upon the particular role he may have played in deciding its outcome.

Therefore, since Chief Judge Wachtler participated in the hearing and decision in the case when he should not have done so, the decision of this Court should be viewed as being irregular and, as found by the *Oakley* court, "inadvertently entered," such that it should be vacated and reargument should be granted.

WHEREFORE, plaintiff respectfully requests an extension of time to move for reargument, and the granting of reargument of this appeal.

s/ Paul W. Beltz
PAUL WILLIAM BELTZ

Sworn to before me this
22nd day of December, 1992.

s/ Kelli Cantwell
KELLI CANTWELL
Notary Public, State of New York

APPENDIX G — COMPLAINT, INDICTMENT, PLEA BARGAIN AND EXCERPTS OF TRANSCRIPT OF PROCEEDINGS IN *UNITED STATES OF AMERICA v. SOL WACHTLER*

CRIMINAL DOCKET

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Case Filed: 02-01-93
Docket No. 93 00058 01
U.S. Mag. Case No. 92-3255C-0

U.S.

vs.

WACHTLER, SOL

U.S. Title/ Section	Offenses Charged	Original Count
18:1952 & 2	Interstate Travel and Use of U.S. Mails and Telephone Facilties in aid of Racketeering/Extortion Ct. 1	1
18:876 & 2	Mailing Threatening Communications Cts. 2, 3, 4	3
18:1001 & 2	False statement to Government Agency Ct. 5	1
	INFORMATION	
18:875 & 2	Use of threatening communications Ct. 1	1

Appendix G

Arrest Warrant Issued: 11/6/92
Complaint: 11/6/92
Offense in Complaint: 18 § 371, 856

ATTORNEYS:
U.S. Attorney or Asst.

Victor Ashrafi (2726)

DEFENSE:

Charles Stillman, Esq.
425 Park Avenue
New York, NY 10022
212-223-0200

DATE OFFENSE: September 1991

Appendix G

Date	No.	Proceedings
11/6/92	1	Complaint filed. (Sealed)
11/9/92	2	Unsealing Order filed.
11/7/92		Arrest Warrant issued.
11/10/92	3	Pen Register filed. (Sealed)
11/20/92	4	Order for Continuance filed.
11/20/92	5	Order modifying bail filed.
11/25/92	6	Order modifying bail filed.
1/4/93	7	Order for continuance filed. (2nd Order)
2/17/93	8	Indictment filed 2/1/93
2/17/93	9	Notice of Allocation and Assignment, filed. (Trenton - Thompson)
2/17/93	10	Order for Discovery and Inspection, filed. (Defendants pretrial motions due 4/7/93; Gov't response due 4/21/93; motions ret'ble 4/26/93 at 10:00 AM; Trial scheduled 6/1/93 at 10:00 AM)
2/17/93	11	Minutes of 2/17/93 proceedings, filed.
2/17/93	12	Notice of Insanity Defense filed.

Appendix G

Date	No.	Proceedings
2-23-93	13	Transcript of Arraignment taken on 2-17-93, filed 02-22-93.
3-3-93	14	Application (Sealed) filed 03-02-93.
3-3-93	15	Order filed 3-2-93. (SEALED) (THOMPSON)
3-17-93	16	Minutes of 3-15-93 filed 3-15-93. (THOMPSON) (CR: RUSSONIELLO) (Telephone conference call)
3-17-93	17	Order modifying bail to allow deft. to travel to Florida filed 3-12-93. (Thompson) (NM)
4-01-93	18	Order modifying bail Re: Permitting deft. to travel to certain designated cities, filed. (THOMPSON) (NM)
04-01-93	19	Minutes of 03-31-93 filed 03-31-93. Retraction of not Guilty Plea to Ct. 1; Waiver of Indictment & Venue filed; Plea: Guilty to Ct. 1 of the Information; Sentence date set for 06-04-93 at 9:30 A.M.; Application by deft. to modify certain parts of bail. Granted. (THOMPSON) (CR: RUSSONIELLO)

Appendix G

Date	No.	Proceedings
04-01-93	20	Government exhibits 1 thru 3 filed 03-31-93 (PER CHAMBER)
04-01-93	21	Waiver of the Indictment and Venue filed 03-31-93.
04-01-93	22	Information filed 03-31-93.
04-01-93	23	Application for permission to enter Plea of Guilty entered 03-31-93.
04-01-93	24	Plea Agreement filed 03-31-93.

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CASE NUMBER 92-32550-01

UNITED STATES OF AMERICA

v.

SOL WACHTLER

CRIMINAL COMPLAINT

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. On or about April to November 6, 1992 in Essex County, in the District of New Jersey defendant did,

SEE ATTACHMENT A

in violation of Title 18 United States Code, Section(s) 371, 876 I further state that I am a(n) Special Agent, FBI and that this complaint is based on the following facts:

SEE ATTACHMENT B

Continued on the attached sheet and made a part hereof:
X Yes _ No

s/ William R. Fleming, Jr.
WILLIAM R. FLEMING, JR.
Special Agent, FBI

Sworn to before me and subscribed in my presence,

Appendix G

November 6, 1992 at Newark, New Jersey

s/ Hon. Stanley R. Chesler,
U.S. Magistrate Judge

Filed: Nov. 6. 1992

Appendix G

Attachment A

From in or about April 1992 until November 6, 1992, in Essex County, in the District of New Jersey, and elsewhere, the defendant

SOL WACHTLER

did knowingly and willfully conspire with one or more other persons to deposit in an authorized depository for mail matter and cause to be delivered by the Postal Service, with intent to extort money from another person, communications containing threats to kidnap a 14-year-old girl and to injure the reputation of J.S., the girl's mother, contrary to 18 U.S.C. § 876.

Overt Acts

In furtherance of the conspiracy and to effect its objects, the defendant and his co-conspirator(s) committed the following overt acts:

1. On or about May 11, 1992, the defendant or a co-conspirator caused to be mailed from Newark, New Jersey, a greeting card addressed to the 14-year-old girl in New York containing sexual references.

2. On or about June 16, 1992, the defendant or a co-conspirator caused to be mailed from Elizabeth, New Jersey, a typed letter addressed to J.S. in New York.

3. On or about September 12, 1992, a co-conspirator delivered a typed letter to the apartment building where J.S. resides in New York.

Appendix G

4. On or about October 9, 1992, defendant made a telephone call from Reno, Nevada, to J.S. in New York demanding payment of $20,000 in exchange for some photographs and tapes.

5. On or about October 28, 1992, defendant made a telephone call from Roslyn, New York, to J.S. regarding the payment of money.

All in violation of Title 18, United States Code, Section 371.

Appendix G

Attachment B

1. I am a Special Agent of the FBI assigned to the Newark Division. I have knowledge of the following facts through interviews with the victim, J.S., and with other potential witnesses, by listening to tape recorded telephone conversations recorded by the victim under FBI supervision, by examining the letters and cards received by the victim, by reviewing trap and trace information from the telephone company, through personal observation and by discussions with other FBI agents who have participated in this investigation.

2. The victim, J.S., lives with her 14-year-old daughter in an apartment in Manhattan, New York. She is separated from her husband.

3. According to J.S., until approximately a year ago, she was involved for several years in an intimate relationship with defendant SOL WACHTLER. After the relationship ended, defendant SOL WACHTLER called her on a number of occasions angrily expressing his displeasure with her dating other men, specifically D.S., who was formerly a resident of New Jersey and has been living at an apartment in New York since becoming separated from his wife.

4. Beginning in approximately April 1992, J.S. received a series of anonymous greeting cards and notes, some of which were addressed to her daughter. A card showing a postmark of Newark, New Jersey, on May 11, 1992, was addressed to her daughter and contained offensive sexual references and a condom in its wrapper. A typed letter addressed to J.S. and postmarked Elizabeth, New Jersey, on June 16, 1992, stated that the writer had some embarrassing pictures and tapes of J.S. and that they were "for

sale." A total of approximately seven cards and letters were received by J.S. or her daughter between April and June, 1992. All of these communications contained a distinctive, handwritten mark, something like a signature.

5. During June and July 1992, J.S. received a series of anonymous typed letters all postmarked in New Jersey. These letters stated in substance that the writer had hired a private investigator named David Purdy to dig up embarrassing information about D.S., that Purdy had obtained photographs and tapes of D.S. and J.S. together, that Purdy wanted to blackmail J.S. with that material, and that the anonymous writer had turned Purdy away and threatened to expose him. The anonymous writer expressed remorse for her actions.

6. In early August 1992, a man appeared at D.S.'s apartment building in New York and left a message with the doorman that David Purdy had stopped by to see D.S.

7. On August 28, 1992, a man appeared at J.S.'s apartment building in New York and delivered a typed letter to the doorman for delivery to J.S. The letter referred to "bugs" placed in D.S.'s apartment and ended with "I should be back in the fall. I'll tell you then how much it will cost you to get me out of your life." This letter was signed with the same distinct, handwritten mark as the cards and letters received by J.S. in the spring.

8. On September 12, 1992, another typed letter was delivered to J.S.'s doorman by a man who fit the description of the man who delivered the August 28 letter. This person does not appear to fit the description of defendant SOL WACHTLER. The September 12 letter demanded that an ad be placed in the New York Times giving

a telephone number for contact regarding the blackmail demand. Such an ad was placed in the New York Times beginning on October 1, 1992, with a new unlisted telephone number located at J.S.'s apartment (hereinafter "the contact number"). The FBI also obtained a court order to trap and trace calls to that number.

9. On October 3, 1992, a hang-up call to the contact number was traced to a mobile telephone number that, according to J.S., was used by defendant SOL WACHTLER. Telephone company records are consistent with that information.

10. On October 4, 1992, J.S. received a call at the contact number from a caller apparently using a mechanical device to disguise his voice. According to J.S., defendant SOL WACHTLER likes gadgets and at one time showed her a device that he claimed could be used to disguise one's voice. The caller referred to David Purdy and said that J.S. would be hearing from him the following week regarding the price, which he said was $20,000. This call was traced to a pay telephone in Glen Oaks, New York, which is within a few miles of defendant SOL WACHTLER's residence and near the Long Island Jewish Hospital. According to J.S., defendant SOL WACHTLER has been undergoing outpatient treatment for a serious medical condition at that hospital for approximately two years.

11. On October 5, 1992, J.S. received another brief call from a disguised voice, who appeared to be speaking to someone else near the telephone about the call being recorded. This call was traced to a pay telephone in New Hyde Park, New York, which is also close to defendant SOL WACHTLER's residence.

12. On October 7, 1992, J.S. received a call traced to a pay

telephone at the Long Island Jewish Hospital in New Hyde Park. In this call, the caller said:[1]

> [W]ell God damn, you better understand me. You're gonna get a letter from me and you better listen to every word of it and do what it tells you to do or you're gonna be in serious deep trouble and you're not gonna see your daughter again, you hear me? I'm a sick and desperate man. I need the money and you'll be hearing from me.

After saying again that he wanted $20,000, the caller told J.S. that she would get photographs, tapes and other information after paying the money on November 7th.

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13. On October 9, 1992, J.S. received another call, this one traced to a pay telephone at Harrah's Casino and Hotel in Reno, Nevada. Defendant SOL WACHTLER was present in Reno on that date for a conference and was registered at that hotel. In this call, the caller, again using a disguised voice, discussed getting into D.S.'s apartment and other places where D.S. and J.S. stayed. He again demanded $20,000 to be paid on November 7th. in response to J.S.'s repeated questions about the threats to her daughter, he said at one point, "You damn right I'm threatening," and then he said:

> If you don't give me, tell you what I'm gonna do. The first thing I'm going to do is [your daughter][2] is going to spend Thanksgiving with

---

1. Quoted portions of tapes are reasonably accurate transcriptions that may require minor correction.

2. Name omitted.

> me. . . .I'm going to take the material that I have . . . I'm gonna send it all over creation.

14. Several days later, J.S. received in the mail a typed letter postmarked in San Antonio, Texas, leaving instructions for the $20,000 to be dropped off in a manila envelope in the cellar entrance stairway at an address near J.S.'s apartment in New York. The drop was to occur at 10:30 a.m. exactly on November 7.

15. At 9:15 p.m. on October 27, 1992, a call was made to J.S.'s apartment at the contact number. The caller asked for J.S., who was not home at the time. That call was traced to a private, members-only club in New York where defendant SOL WACHTLER was present for a meeting at the time of the call. Defendant is a member of the club.

16. On October 28, 1992, J.S. received a call traced to a pay telephone in Roslyn, New York. The FBI recovered the telephone handset from that pay telephone within about two hours of the call. A latent fingerprint from the handset matched a fingerprint of defendant SOL WACHTLER. In that call, J.S. asked how she could be sure that she would get materials back upon paying the money. The caller said:

> I'll tell you what you are getting back, lady, if you don't do that, if you fuck up (UI) me at all I promise you it will cost you $200,000 to get your daughter back. How does that suit you?

17. On November 3, 1992, at 6:58 p.m., a call was made to J.S. and traced to a pay telephone at LaGuardia Airport in the area of the U.S. Air ticket center. At 11:22 p.m. the same date, J.S. received another call traced to a pay telephone at Standiford Field

Airport in Louisville, Kentucky. According to airline records, defendant SOL WACHTLER flew to Louisville out of LaGuardia on U.S. Air at approximately7:59 p.m. on November 3 and arrived at 11:05 p.m. in Louisville on November 4 and 5.

18. In the calls from LaGuardia and the Louisville airport, the caller again discussed payment of the $20,000 and threatened to "snatch your kid" if the money was not paid. He also changed the time for dropping off the money on November 7 to 10:15 a.m. and said that he would drop off his materials at J.S.'s apartment building at 1:00 p.m.

Appendix G

U.S. Department of Justice
United States Attorney
District of New Jersey
970 Broad Street, Room 502
Newark, New Jersey 07102
201/645-2700

March 30, 1993

MC:MAG:JM
9205398

Charles A. Stillman, Esq.
Stillman, Friedman & Shaw, P.C.
425 Park Avenue
New York, New York 10022

Theodore V. Wells, Jr., Esq.
Lowenstein, Sandler, Kohl, Fisher & Boylan
65 Livingston Avenue
Roseland, New Jersey 07068

Re: Plea Agreement with Sol Wachtler

Dear Mr. Stillman and Mr. Wells:

This letter sets forth the full and complete agreement between Sol Wachtler and the United States Attorney for the District of New Jersey.

Charge

Conditioned on the understandings specified below, the

Appendix G

United States will accept a guilty plea from Sol Wachtler to an Information, which charges him with transmitting in interstate commerce threats to kidnap the minor daughter of Joy Silverman, in violation of 18 U.S.C. § § 875(c) and 2. Sol Wachtler will waive prosecution by Indictment and will waive any objections to venue. If Sol Wachtler enters a guilty plea and is sentenced on this charge, the United States Attorney for the District of New Jersey will not bring any further charges against Sol Wachtler relating to the criminal acts charged in the Indictment, Criminal No. 93-58 (AET). In addition, at the time of sentencing in this matter, the United States will move to dismiss the Indictment, Criminal No. 93-58 (AET) against Sol Wachtler.

Sentence and Other Penalties

The sentence to be imposed upon Sol Wachtler is within the sole discretion of the sentencing judge, subject to the provisions of the Sentencing Reform Act, 18 U.S.C. § § 3551-3742 and 28 U.S.C. § § 991-998, and the United States Sentencing Guidelines. The sentencing judge may impose the maximum term of imprisonment and the maximum fine that are consistent with the Sentencing Reform Act and the Sentencing Guidelines, up to and including the statutory maximum term of imprisonment and the statutory maximum fine.

The violation of 18 U.S.C. § 875(c) charged in the Information carries a statutory maximum penalty of five years' imprisonment and a $1,000 fine. Pursuant to 18 U.S.C. § 3571, the sentencing judge could impose an alternative fine of up to $250,000 or twice the gross profits to Sol Wachtler or gross loss to any victims of this offense. The Sentencing Reform Act and the Sentencing Guidelines also may impose a minimum term of imprisonment and/or fine, and the Sentencing Guidelines may authorize

departure from the minimum and maximum penalties under certain circumstances. All fines imposed by the sentencing court are subject to the payment of interest.

Further, in addition to imposing any other penalty on Sol Wachtler the sentencing judge: (1) will order Sol Wachtler to pay an assessment of $50, pursuant to 18 U.S.C. § 3013, which assessment must be paid on or before the date of sentencing; (2) may order Sol Wachtler to pay restitution pursuant to 18 U.SC. § § 3663 and 3664; (3) may order Sol Wachtler, pursuant to 18 U.S.C § 3555, to give notice to any victims of his offense; and, (4) pursuant to 18 U.S.C. § 3583 and § 5D1.2 of the Sentencing Guidelines, may require Sol Wachtler to serve a term of supervised release of at least two years but not more than three years, which will begin at the expiration of any term of imprisonment imposed. Should Sol Wachtler be placed on a term of supervised release and subsequently violate any of the conditions of supervised release before the expiration of its term, Sol Wachtler may be sentenced to not more than two years' imprisonment in addition to any prison term previously imposed and in addition to the statutory maximum term of imprisonment set forth above.

Stipulations

The United States and Sol Wachtler agree to stipulate at sentencing to the statements set forth in the attached Schedule A, which hereby is made a part of this plea agreement. This agreement to stipulate, however, cannot and does not bind the sentencing court, which may make independent factual findings and may reject any or all of the stipulations entered into by the parties. Moreover, this agreement to stipulate on the part of the United States is based on the information and evidence that this Office possesses as of the date of this plea agreement. Thus, if this Office

obtains or receives additional evidence or information prior to sentencing that it determines to be credible and to be materially in conflict with any stipulation in the attached Schedule A, the United States shall not be bound by any such stipulation. A determination that any stipulation is not binding shall not release either the United States or Sol Wachtler from any other portion of this plea agreement, including any other stipulation.

Rights of the Parties at Sentencing

This Office cannot and does not make any representation or promise as to what guideline range will be found applicable to Sol Wachtler as to what sentence Sol Wachtler ultimately will receive. This Office, however, does reserve its right to take a position with respect to the appropriate sentence to be imposed on Sol Wachtler by the sentencing judge. In addition, this Office will inform the sentencing judge and the Probation Office of: (1) this agreement, (2) the nature and extent of Sol Wachtler's activities and relevant conduct with respect to this case; and (3) all other information relevant to sentencing, favorable or otherwise, in the possession of this Office.

The United States specifically reserves the right to correct factual misstatements relating to sentencing proceedings; to appeal Sol Wachtler's sentence pursuant to 18 U.S.C. § 3742(b); and to oppose any appeal of his sentence by Sol Wachtler pursuant to 18 U.S.C. § 3742(a). The position of the United States regarding the defendant's sentence on any such appeal will be consistent with the position of the United States regarding the sentence at the time of sentencing.

Sol Wachtler reserves his right to present to the sentencing judge and the Probation Office all other information relevant to

sentencing which he deems appropriate. Sol Wachtler specifically reserves his right to correct factual misstatements relating to sentencing proceedings; to appeal his sentence; and to oppose any appeal of that sentence by the United States. The position he takes in any such appeal shall be consistent with the position he takes regarding the sentence at the time of sentencing.

Other Provisions

This agreement is limited to the United States Attorney's Office for the District of New Jersey and cannot bind other federal, state, or local prosecuting authorities. However, this Office will bring this agreement to the attention of other prosecuting offices, if requested to do so.

The Government will not oppose a request by the defendant that the Court recommend a particular institution in which the defendant should be incarcerated so long as the institution the defendant proposes to the Court satisfies the requirements of U.S.S.G. § 5C1.1(f) and Commentary 8 thereto. Both parties understand that the decision regarding the institution in which the defendant should be incarcerated is within the discretion of the Bureau of Prisons. The Government will not oppose a request by the defendant that he be allowed to surrender voluntarily at the designated institution.

Finally, this agreement was reached without regard to any civil matters that may be pending or commenced in the future against Sol Wachtler, including, but not limited to, proceedings by the Internal Revenue Service relating to potential civil tax liability.

This agreement constitutes the full and complete agreement between Sol Wachtler and the United States Attorney for the

Appendix G

District of New Jersey. No additional promises, agreements, or conditions have been entered into other than those set forth in this letter, and none will be entered into unless in writing and signed by all parties.

Very truly yours,

MICHAEL CHERTOFF
United States Attorney

Appendix G

I have received this letter from my attorneys, Charles A. Stillman, Esq. and Theodore V. Wells, Jr., Esq., and I have read it and understand it fully. I hereby acknowledge that it fully sets forth my agreement with the Office of the United States Attorney for the District of New Jersey. I state that there have been no additional promises or representations made to me by any officials or employees of the United States Government or by my attorneys in connection with this matter.

s/ Sol Wachtler

Witnessed by:

s/ Charles A. Stillman Esq.
CHARLES A. STILLMAN, ESQ.
Counsel for Sol Wachtler

s/ Theodore V. Wells, Jr., Esq.
THEODORE V. WELLS, JR., ESQ.
Counsel for Sol Wachtler

Dated: March 31, 1993

Appendix G

PLEA AGREEMENT WITH Sol Wachtler

Schedule A

The United States and Sol Wachtler agree to stipulate at sentencing to the statements set forth below, subject to the conditions in the attached plea agreement.

1. The guideline applicable to violations of 18 U.S.C. § 875(c) is 2A6.1, which has a base offense level of 12. *See* U.S.S.G. § 2A6.1.

2. To the extent that the facts admitted to in the Information technically encompass extortionate conduct, the parties stipulate that Sol Wachtler's offense did not cause or threaten the typical harm or evil addressed by U.S.S.G. § 2B3.2 (extortion guideline) in that the defendant's intent was not financial or economic gain and there is no evidence that the defendant took any steps to take physical possession of the money. The gravamen of his offense was one of threatening communications to harass, as opposed to the type of offense addressed by § 2B3.2, which contemplates an offense driven by desire for financial or property gain. Accordingly, Sol Wachtler's offense should be treated for purposes of sentencing as a series of threatening communications as set forth in paragraph 1 above. There is no evidence that Sol Wachtler intended to carry out his threats to kidnap Joy Silverman's minor daughter.

3. The evidence establishes that Sol Wachtler's offense involved threats to kidnap the minor daughter of Joy Silverman, thus rendering Ms. Silverman unusually vulnerable. Accordingly, the offense level should be increased by two levels. *See* U.S.S.G. § 3A1.1.

Appendix G

4. The evidence establishes that Sol Wachtler's offense involved abuses of trust that meet the requirements for an upward increase of two levels pursuant to U.S.S.G. § 3B1.3. Accordingly, the offense level should be increased by two levels. *See* U.S.S.G. § 3B1.3.

5. If Sol Wachtler clearly demonstrates acceptance of responsibility for his offense, making a complete admission of allelements of his offense and all relevant conduct at the time of his plea and sentence, he is entitled to a two level reduction in offense level. *See* U.S.S.G. § 3E1.1(a). The quality of Sol Wachtler'sacceptance of responsibility shall be judged by Sol Wachtler's own statements and answers to questions.

6. If Sol Wachtler qualifies for the decrease under paragraph 5, then he is entitled to an additional one level reduction in offense level because he timely notified authorities of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently. *See* U.S.S.G. § 3E1.1(b)(2).

7. If Sol Wachtler qualifies for the decreases under paragraphs 5 and 6, the relevant guideline range will be level 13. The United States and the defendant agree that there should be no departures from that relevant guideline range. Neither party will seek, argue for or move for any such departure from that relevant guideline range. If the Court determines that the relevant guideline range is other than level 13, each party may move for a departure that places the sentence within the level 13 guideline range. Moreover, in the event that the Court determines that the base offense level is greater than that set forth in paragraph 1, the Government and the defendant will move jointly under U.S.S.G. § 5K2.11 for a departure down to level 13.

Appendix G

UNITED STATES DISTRICT COURT
DISTRICT OF THE NEW JERSEY
CRIMINAL NO. 93-58 (AET)

UNITED STATES OF AMERICA

V.

SOL WACHTLER,

DEFENDANT.

TRANSCRIPT OF:
PLEA

WEDNESDAY, MARCH 31, 1993
U.S. COURTHOUSE
TRENTON, NEW JERSEY

BEFORE: THE HONORABLE ANNE E. THOMPSON, U.S.D.J.

APPEARANCES:

BY: MICHAEL CHERTOFF, UNITED STATES ATTORNEY
FOR THE DISTRICT OF NEW JERSEY
MICHAEL A. GUADAGNO, ASSISTANT U.S. ATTORNEY
JAMES F. MC MAHON ASSISTANT U.S. ATTORNEY
ON BEHALF OF THE GOVERNMENT

STILLMAN, FRIEDMAN & SHAW, ESQS.
BY: CHARLES A. STILLMAN, ESQUIRE (N.Y. BAR)
PETER A. CHAVKIN, ESQUIRE (N.Y. BAR)
-AND-

Appendix G

LOWENSTEIN, SANDLER, KOHL, FISHER & BOYLAN,
ESQS.
BY: THEODORE V. WELLS, JR., ESQUIRE (N.J. BAR)
ON BEHALF OF THE DEFENDANT

* * * *

VINCENT RUSSONIELLO, CSR, RPR
OFFICIAL COURT REPORTER
U.S. DISTRICT COURT
138 PAXSON AVENUE
TRENTON, NEW JERSEY 08690
(609) 588-9516

PURSUANT TO SECTION 753, TITLE 28 USC, THE FOLLOWING TRANSCRIPT IS CERTIFIED TO BE AN ACCURATE TRANSCRIPTION OF MY STENOGRAPHIC NOTES IN THE ABOVE-ENTITLED MATTER.

s/ Vincent Russoniello
VINCENT RUSSONIELLO, CSR, RPR

* * *

[3] THE COURT: Good morning.

MR. CHERTOFF: Good morning, your Honor.

THE COURT: This is the *United States of America v. Sol Wachtler.*

Note your appearances, please, on behalf of the Government.

MR. CHERTOFF: Michael Chertoff, Michael Guadagno and James McMahon for the United States.

Appendix G

THE COURT: Thank you.

On behalf of the Defendant Wachtler.

MR. STILLMAN: Charles Stillman, Ted Wells and Peter Chavkin, your Honor.

THE COURT: Very well. Counsel, I'm advised that you have reached a plea agreement which would resolve the pending indictment against the Defendant Saul Wachtler, that this plea agreement would contemplate an information which would be filed, which would substitute for the indictment and to which the defendant would plea guilty.

I'll ask the Government to initially tell us what is the proposal, the proposed resolution.

MR. CHERTOFF: Thank you, your Honor.

As your Honor knows, there is currently a five-count indictment against this defendant. The first count of which alleges a violation of the Travel Act, interstate travel,

* * *

[8] the contrary, they furnished us with a very kind letter indicating they are very appreciative of the positions taken by the Government, the work done on the case, and I have been in very close contract with all the victims and I am satisfied they have no reservations about this.

But I need to say I think because it's important the victims be protected as well, it is not the victims' responsibility, and if some

view the agreement here as harsh or insistence on certain terms as harsh, I take the responsibility for that and not the victims.

I think, your Honor, that fairly describes the general terms of the agreement that are supported in the documents before the Court.

THE COURT: Thank you very much. I will ask if counsel will come forward with the defendant.

Ms. Lytwyn, I would ask if the oath will be administered.

SOL WACHTLER, sworn.

BY THE COURT:

Q. Mr. Wachtler, you heard, have you not, the representations made by counsel for the Government as to the resolution proposed here today?

A. Yes, I have, your Honor.

Q. Is there anything that was said with which you disagree?

A. No.

* * *

[29] THE COURT: Yes, that date will be corrected to March 31st.

BY THE COURT:

Appendix G

Q. Now, before I can accept the guilty plea from you, Mr. Wachtler, I have to have a statement by you admitting to the facts. And, quite frankly, apropos of the discussion we had earlier with regard to mental state, I cannot accept your guilty plea unless you are prepared to acknowledge here in open court that you committed the crime when you were competent, when you were sane, when you were not disabled by reason of mental illness. So let's turn to that discussion.

I understand you and your attorneys have worked out a statement that you are prepared to actually read here today. You can read it or just speak it out. I guess it's simpler actually to read it.

Frequently this is done with questions asked by the judge and answers given by the defendant. There is nothing wrong with having the defendant just make a free flowing statement. The essential thing is that the factual statement by the defendant has to include the elements of the offense.

A. I understand.

Q. It has to be a voluntary and knowing recitation that I committed these acts which would constitute this crime and therefore I am pleading guilty, I am admitting to doing [30] these things.

So if that's what is contemplated by your attorneys with you, I think I have a copy of that statement, I will ask you what it is you did which forms the basis for your guilty plea here today.

A. Yes, your Honor, and I would appreciate the opportunity to do this in narrative form as you noted.

Appendix G

I am pleading guilty to violating Title 18 U.S.C. Section 875(c) as set forth in the superseding information and acknowledge that I engaged in the acts set forth in paragraph 12 of the information.

After my relationship with Joy Silverman ended in the summer of 1991, I began a course of activity aimed at causing Ms. Silverman to seek my help and protection. To do this, I hoped to put Ms. Silverman in fear that her reputation would be ruined by publicizing her relationship with David Samson. In addition, I began to attempt to find ways to discredit David Samson, so that Ms. Silverman would seek out my help instead of his in coping with the threats to his reputation.

Specifically, I directed my staff to maintain a file on David Samson that included the New York Office of Court Administration attorney registration form for David Samson, which is a publicly available document, on which Mr. Samson's signature appeared.

[31] Also, I requested the presiding Justice of the Supreme Court, Appellate Division, Third Department, to send me a copy of the confidential New York State bar admissions file of David Samson, which I received several days later.

My activity began with a series of hang-up calls to Ms. Silverman in the fall of 1991.

Q. Hang-up calls?

A. Yes. When that did not cause her to contact me for help, I called Elaine Samson and stated I was David Purdy, a private detective, and I had information about her husband and Joy Silverman.

Appendix G

Later, the Purdy character conveyed to Ms. Silverman there were compromising pictures of Ms. Silverman and Mr. Samson. In the guise of Purdy, I also sent letters to Ms. Silverman and her daughter. I signed some of those cards and letters with a signature similar to the one David Samson used on his attorney registration form to try to better convince Ms. Silverman that there really was a Purdy and he had compromising pictures.

I also had Purdy write about certain details of Ms. Silverman's daily life which were, based on my recollections, likely to be real.

In April 1992, I also made several calls to a civic association leader in Linden, New Jersey, in which I encouraged her to speak with David Samson and/or identified [32] myself as David Samson.

In the early summer of 1992, I was told by two persons close to Ms. Silverman that she suspected that Sol Wachtler, that I, was behind these threats. In an effort to dissuade her, I created another fictitious person, a woman who supposedly also lived in Linden, New Jersey, who apologized to Ms. Silverman in writing for having asked Purdy to get involved in blackmail. At the same time, I wrote two anonymous letters to prosecutorial agencies in New Jersey blaming Purdy and the Seales for the threats to Ms. Silverman.

In August 1992, still not having been contacted by Ms. Silverman and believing she still suspected me in order to remove that suspicion, I began escalating the activity eventually demanding $20,000 for the supposedly compromising pictures and ultimately on October 9, 1992, October 13, 1992 and November 3, 1992, I conveyed threatening communications in interstate commerce to kidnap her daughter if she did not comply with my requests.

Appendix G

I at no time intended to kidnap or harm in the slightest way Ms. Silverman's daughter and I never wanted to nor did I take any money from Ms. Silverman.

The extreme nature of these threats were meant to cause Ms. Silverman to believe that in fact there was someone named Purdy, and to be in fear so she would have [33] reason to seek Sol Wachtler's assistance.

In many of the calls to Ms. Silverman in October 1992, I also used a voice altering device to conceal that it was me. Again, I hoped this conduct would be so unlike anything she could relate to me that she would seek my help. Again, she did not.

I did all of the acts set forth in paragraph 12 of the information knowingly and wilfully. At the time I made the threats set forth in the information, I was conscious and aware of my actions and understood the making of such threats was wrong and illegal.

I have been told by several psychiatrists that I suffered from a mental illness during that year, but I do not believe this would or should excuse what I did. As specified by Title 18, U.S.C. Section 17, I was able to appreciate the nature and quality of my acts.

I know, your Honor, that my behavior from late 1991 to late '92 was foreign to my 62 years on earth. I am deeply ashamed and sorry for what I have done to others, to Ms. Silverman, to my wife and children, and those who entrusted New York State's court system to my care. I know that I can never make up for these acts, that I express my profound sorrow and regret.

THE COURT: Mr. Chertoff, are you satisfied that this statement made by this defendant in open court provides [34] a

factual basis for the acceptance of this guilty plea.

MR. CHERTOFF: Yes, I am, your Honor.

In connection with that, I would like to file with the Court, Government Exhibit 1, 2 and 3, which are the threatening communications which are actually the subject of the admissions made today.

THE COURT: You may come forward and do that.

Government Exhibit 1 being the recording of October 9, 1992.

Government Exhibit 2, the November 3rd telephonic recording transcript.

Government Exhibit 3 is what, Mr. Chertoff?

MR. CHERTOFF: Your Honor, it is a letter that was sent on October 13th, 1992. I should point out to the Court on the transcripts where it says unknown subject, that is the defendant Sol Wachtler.

THE COURT: Government Exhibit 3 was sent through the mail to Ms. Joy Silverman?

MR. CHERTOFF: That's correct, and the exhibit actually contains the postmarks and the stamps.

THE COURT: Very well. The three exhibits may be filed as documents pursuant to this proceeding.

Appendix G

BY THE COURT:

Q. All right. Turning to this information to which you propose to plead guilty, I note the information itself is 12

* * *